Supreme Court, U.S.
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No. 04-

IN THE

Supreme Court of the United States

LAWRENCE (BUD) MOON, JR., *et al.*,

Petitioners,

v.

NORTH IDAHO FARMERS ASSOCIATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF IDAHO

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Defendants are Kentucky Bluegrass farmers in Northern Idaho who, for two months every year, burn their grass fields after harvest, producing thick plumes of smoke that choke and sicken Plaintiffs and thousands of class members who live in the area, forcing many of them to confine themselves inside or flee their properties altogether. Plaintiffs sued Defendants in Idaho state court for their injuries based on Defendants' invasions of their properties. During the course of the litigation, the State of Idaho passed Idaho Code § 22-4803A(6), which immunizes Defendants from any liability to Plaintiffs for these property invasions, leaving them free to interfere with Plaintiffs' property rights. On review, the Idaho Supreme Court found that I.C. § 22-4803A(6) did not violate the Fifth Amendment to the United States Constitution. Did this ruling affect a fundamental property right protected by the Constitution and did it conflict with rulings from this Court and various state supreme courts?

2. Under these same circumstances, the Idaho Supreme Court held that a state-sanctioned physical invasion of a home that renders the home uninhabitable for some and interferes with use and enjoyment for many others is not a physical taking. Does that holding directly conflict with this Court's holdings in *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979), which held that any servitude or easement imposed on private property necessarily constitutes "an actual physical invasion of the privately owned" home?

3. This Court has held that the "great principle of the common law which is equally the teaching of Christian morality, to use one's property as not to injure others," forbids a government from granting immunity to any private person for invading the property rights of another. *Baltimore &*

Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 331 (1883). Does the Idaho Supreme Court decision conflict with that ruling?

PARTIES TO THE PROCEEDING

This Petition is filed on behalf of plaintiffs (petitioners) Lawrence (Bud) Moon, Jr., individually and on behalf of all others similarly situated; Alex Heisel, by and through her parents and guardians Trina Heisel and James Heisel; Kaley Fowler, by and through her parent and guardian, Laura Fowler; Jeanne Wolcott; Jerry Vickers; and Bruce Charles Rothermel.

The defendants (respondents) are North Idaho Farmers Association; Wayne Meyer; William Dole; Michael Dole; Warren Dole; Jacquot Farms Enterprises, Inc.; Satchwell Farms, Inc.; Wallace Meyer; Terrell K. Baune; Baune Farms, Inc.; Paul Deshiell; Arnold Brincken; Keith Daman; Paul Daman; Denny Bros., L.L.C.; Chad Denny; Matthew Drechsel; Drechsel Brothers, Inc.; Dennis Duncan; David Duncan; Chris Duncan; Joyce Duncan; Randy Duncan; David Fish; Thomas Freeburg; David Gumm; Charles A. Hahner; Hahner Farms, Inc.; Larry Hansen; Joyce Hansen; Martin Hanson; Hatter Creek Farms, Inc.; Don Hay; Clarence Haeg; Randy Holt; Duane Jenneskens; Cindy Jenneskens; Dale R. Johnson; Ted Lacy; Phillip Lampert; Nick Lawson; Casey Lawson; Allen Lewis; Maple Leaf Farm, Inc.; Herbert W. Millhorn; Millhorn Farms, Inc.; Bruce Mills; Richard Morrison; Elmer Ness; Chris R. Ramsey; Michael Roecks; Rogada Farms, Inc.; John Schultz; Karl Schultz; Tammy Schultz; Ron Tee; Alan Thomas; Windy Hill Farm, Inc.; Todd E. Wright; Gary Wright; Wrights, Inc.; Wade McLean; Doug Bruce; Michael Schlepp; Gary French; Lampert Farm Ranch, Inc.; Earl Clausen; Michael La Shaw; Catherine Morris; Terry Nichols; Eugene Towne; Jeff Bloomsburg; Brian La Shaw; Joe Sievers; Bergen Bothman; Schlepp Ranch; Clausen Farms, Inc.; Larry Heaton; David Lampert; Eric Larson and the State of Idaho.

On May 27, 2003 a Third Party Complaint was filed in the District Court of the First Judicial District of the State of Idaho, in and for the County of Kootenai. The Third Party Complaint named the above listed plaintiffs and defendants and also set forth the following parties.

The third-party plaintiffs are Lampert Farm & Ranch, Inc.; Earl Clausen; Michael La Shaw; Catherine Morris; Terry Nichols; Eugene Towne; Jeff Bloomsburg; Brian La Shaw; Larry Heaton; Joe Sievers; G. Wade McLean; Doug Bruce; Michael Schlepp; and Gary French.

The third-party defendants are Tim Freeburg and Michael Freeburg; Henry Bentz; Chester Franz, d/b/a Double F. Ranch; Michael Hemken; Hemken Farms, Inc.; Terry Jacklin; Walter Meyer; Sherry Claus, as personal representative of the Estate of John Carter; Gary Johnson, d/b/a D&G Farms; Daman Brothers Partnership; Gary Dreshel, d/b/a Dreshel Brothers; Jim Fischer; Ford Gumm; Alvin Haas; Haas Farms General Partnership; Francis Hughes; J.R. Simplot Company, d/b/a Jacklin Seed-Simplot; Rodney Jacquot; Ted Lacy, d/b/a Lacy Farm Enterprises; Thelma McClellan; as personal representative of the Estate of L.E. McClellan; William Mellick; Walter Meyer; Glen Miles; Morrfarms, Inc.; Heaton Farms Partnership; KSH Partnership; and Gerald Holt d/b/a Rockcreek.

All of the third-party plaintiffs and defendants are being served as respondents herein.

RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners hereby state that they are individuals and thus have no corporate parents or subsidiaries.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO THE PROCEEDING	iii
RULE 29.6 STATEMENT	iv
TABLE OF CONTENTS	v
TABLE OF CITED AUTHORITIES	vii
TABLE OF APPENDICES	xii
OPINIONS BELOW	1
JURISDICTION	1
PERTINENT STATUTORY PROVISIONS	1
STATEMENT OF THE CASE	2
A. The Trial Court Found That Defendants' Field Burning Irreparably Harms Plaintiffs	3
B. The Idaho Legislature Enacts I.C. § 22-4803A(6) to Immunize the Defendants From Liability in This Action	7
C. The District Court Strikes I.C. § 22-4803A(6) As Unconstitutional	9
D. The Idaho Supreme Court Reverses And Finds I.C. § 22-4803A(6) Constitutional	12

Contents

	Page
REASONS FOR GRANTING THE PETITION ...	13
A. The Idaho Supreme Court Decided an Important Question Under the United States Constitution	13
B. By Affirming I.C. § 22-4803A(6), The Idaho Supreme Court Decided The Constitutional Question Contrary to Other State Supreme Courts	21
CONCLUSION	29

TABLE OF CITED AUTHORITIES

CASES

Page

Baltimore & Potomac R.R. Co. v. Fifth Baptist Church,
108 U.S. 317 (1883) ..... *passim*

Beatty v. United States,
203 F. 620 (4th Cir. 1913) 17

Boomer v. Atlantic Cement Co.,
257 N.E.2d 870 (N.Y. 1970) 17

Bormann v. Board of Supervisors,
584 N.W.2d 309 (Iowa 1998) ..... *passim*

Brown v. Legal Foundation,
538 U.S. 216 (2003) 20

Buchanan v. Simplot Feeders Ltd. P'ship,
952 P.2d 610 (Wash. Sup. Ct. 1998) 16

Chicago, B. & Q. R. Co. v. City of Chicago,
166 U.S. 226 (1897) 13

Dickman v. Commissioner,
465 U.S. 330 (1984) 14

Eaton v. B. C. & M. R.R.,
51 N.H. 504 (1872) 11

Gay v. Taylor,
19 Pa. D. &.C. 31 (Pa. Cty. Ct. 1932) 25

Cited Authorities

Page

Gilpin v. Sierra Nevada Consol. Mining Co.,
23 P. 547 (Idaho Sup. Ct. 1890) 7

Hughes v. State,
328 P.2d 397 (Idaho Sup. Ct. 1958) 14

Jordan v. Canton,
265 A.2d 96 (Me. Sup. Ct. 1970) 14

Kaiser Aetna v. United States,
444 U.S. 164 (1979) ..... *passim*

Lorenzi v. Star Market Co.,
115 P. 490 (Idaho Sup. Ct. 1911) 25

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992) 19, 20

Martin v. Port of Seattle,
391 P.2d 540 (Wash. Sup. Ct. 1964) 16

McMoran v. State,
345 P.2d 598 (Wash. Sup. Ct. 1959) 14

Moon v. North Idaho Farmers Ass'n,
96 P.3d 637 (2004) 1

Pennsylvania R. Co. v. Angel,
7 A. 432 (N.J. Ct. App. 1886) 22, 27, 28

Phelps v. Board of Supervisors of County of Muscatine,
211 N.W.2d 274 (Iowa 1973) 22

Cited Authorities

Page

Portsmouth Harbor Land & Hotel Co. v. United States,
260 U.S. 327 (1922) 16

PruneYard Shopping Ctr. v. Robins,
447 U.S. 74 (1980) 16, 17

Quintain Dev. v. Columbia Natural Res.,
556 S.E.2d 95 (W. Va. 2001) 17

Richards v. Washington Terminal Co.,
233 U.S. 546 (1914) 13, 24, 27, 28

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002) 19, 20, 21

Tibbs v. City of Sandpoint,
603 P.2d 1001 (Idaho Sup. Ct. 1979) 16

Tiegs v. Watts,
954 P.2d 877 (Wash. Sup. Ct. 1998) 25

Toledo Disposal Co. v. Ohio,
106 N.E. 6 (Ohio Sup. Ct. 1914) 25

United States v. Causby,
328 U.S. 256 (1946) 14, 16, 17, 21

United States v. Dickinson,
331 U.S. 745 (1947) 10

Cited Authorities

Page

United States v. General Motors Corp.,
323 U.S. 373 (1945) 14

Webb's Fabulous Pharmacies, Inc. v. Beckwith,
449 U.S. 155 (1980) 17, 18, 19

UNITED STATES CONSTITUTION

Fifth Amendment ..... *passim*

Fourteenth Amendment 1, 13

STATUTES

28 U.S.C. § 1257(a) 1

28 U.S.C. § 2403(b) 1

Idaho Code § 22-4803A(6) ..... *passim*

RULES

U.S. Sup. Ct. R. 10(b) 13

U.S. Sup. Ct. R. 14(1)(e)(v) 1

U.S. Sup. Ct. R. 29(4)(C) 1

MISCELLANEOUS

Page

66 C.J.S. Nuisances § 7 (1950) 22

BLACK'S LAW DICTIONARY 527 (7th ed. 1999) 11, 17

RESTATEMENT (THIRD) PROPERTY § 1.2(1) (2000) ... 11

RESTATEMENT OF THE LAW OF PROPERTY § 451 ...11, 12, 17

Art. I, sec. 14 9

TABLE OF APPENDICES

	Page
Appendix A — Opinion Of The Supreme Court Of The State Of Idaho Filed August 2, 2004	1a
Appendix B — Memorandum Decision And Order Granting Plaintiffs' Motion To Declare HB 391 Unconstitutional Of The District Court Of The First Judicial District Of The State Of Idaho In And For The County Of Kootenai Dated And Filed June 4, 2003	35a
Appendix C — Order Granting Plaintiffs' Motion For Class Certification Of The District Court Of The First Judicial District Of The State Of Idaho In And For The County Of Kootenai Filed April 28, 2003	92a
Appendix D — Memorandum Opinion And Order Granting Plaintiffs' Motion For Preliminary Injunction Dated And Filed August 30, 2002 ...	118a
Appendix E — Memorandum Opinion And Order Denying Defendants' Motions To Dismiss Of The District Court Of The First Judicial District Of The State Of Idaho In And For The County Of Kootenai Dated And Filed August 19, 2002	151a
Appendix F — Order Granting Petition For Writ Of Prohibition Of The Supreme Court Of Idaho Dated September 12, 2002	195a
Appendix G — Pictures	198a

PETITION FOR A WRIT OF CERTIORARI

Plaintiffs respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of the State of Idaho in this case.

OPINIONS BELOW

The opinion of the Idaho Supreme Court is reprinted at Appendix ("App.") 1a-34a, and was reported at 96 P.3d 637 (2004), as *Moon v. North Idaho Farmers Ass'n*. Four opinions of the Idaho District Court, which contain relevant findings of fact, are reprinted at App. 35a-194a.

JURISDICTION

The Idaho Supreme Court entered its decision on August 2, 2004. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

Pursuant to Supreme Court Rules 14(1)(e)(v) and 29(4)(c), Petitioners state that the constitutionality of an Idaho California state statute is at issue in their Petition and, thus, 28 U.S.C. § 2403(b) may apply. Plaintiffs below notified the Attorney General of the State of Idaho that they challenged the constitutionality of an Idaho state statute and the Attorney General responded by submitting *amici* briefs supporting Petitioners to the Idaho District Court and supreme court in this litigation.

PERTINENT STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution provides that "no person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the U.S. Constitution prohibits any state from "depriving any person of life, liberty, or property without due process of law," thereby making the Fifth Amendment applicable to the states and their political subdivisions.

Idaho Code § 22-4803A(6), provides:

> Crop residue burning conducted in accordance with section 22-4803 Idaho Code, shall not constitute a private or public nuisance or constitute a trespass. Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to section 22-4803(3), Idaho Code, provided such activities are conducted in accordance with chapter 48, title 22, Idaho Code, and rules promulgated thereunder.

STATEMENT OF THE CASE

Petitioners respectfully suggest that the Idaho Supreme Court's decision in this case so radically departs from this Court's teachings and from that of other states as to warrant the grant of *certiorari*.

This case arises because of the irreparable harm that Defendants/Respondents, farmers who grow Kentucky bluegrass in north Idaho who torch their grass fields after they harvest the grass seed, annually inflict upon a certified class of thousands[1] of chronically ill and disabled people in order to increase profits in their commercial endeavor. The smoke that rises from these fields creates dense, dark plumes that envelope and invade the class members' homes, aggravate their underlying diseases, substantially endanger their lives in some cases, interfere with the use and enjoyment of their property, and ultimately either forcibly evict or imprison countless Idaho and Washington citizens throughout the August and September field-burning season.

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1. The Idaho District Court certified the class on April 28, 2003. The class consists of several thousand and perhaps more than 10,000 people.

The trial court entered factual findings that the Defendants' conduct inflicted a serious injury upon the property and personal rights of Plaintiffs and class members. Thereafter, while the case was pending, ***lead defendant Wayne Meyer, who is also an Idaho state legislator, succeeded in urging the State of Idaho to pass a law that immunizes him and the rest of the Defendants from liability for the injuries they cause to Plaintiffs and class members***. The trial court tossed out the law as violating the U.S. and Idaho constitutions. The Idaho Supreme Court accepted interlocutory review reversed. The court acknowledged the law's harsh consequence to Plaintiffs:

> This immunity thus entitles the grass farmers to invade the property of the plaintiffs' with the smoke from their burning fields, while preventing the plaintiff landowners from full possession, use, and quiet enjoyment of their land and denying them a remedy from the invasion from the farmers' smoke. App. at 15a.

The court nonetheless ruled that I.C. § 22-4803A(6) did not unconstitutionally deprive Plaintiffs and the class of property rights.

A. The Trial Court Found That Defendants' Field Burning Irreparably Harms Plaintiffs

Plaintiffs filed suit in Idaho District Court on June 10, 2002, principally to protect their property rights and to stop the choking smoke plumes from Defendants' post-harvest bluegrass field burning from trespassing into their homes and across their lands and to abate the nuisance created by the Defendants' smoke. App. at 111a-112a. Plaintiffs filed a motion for a preliminary injunction in July 2002. That motion contained over 100 affidavits and declarations in support of the motion, including testimony from north Idaho's leading pulmonologists who treat class members every August and September because of the Defendants' conduct. It included testimony from the class

members themselves who are imprisoned in or evicted from their homes; testimony from agricultural experts who explained that field burning is not necessary to grow Kentucky bluegrass in north Idaho; and testimony showing that bluegrass seed is a thriving business in Oregon and Washington without burning.

In August 2002, the Idaho District Court held a two-day evidentiary hearing to determine whether a preliminary injunction should issue. The court heard from medical experts, State officials from Washington and Idaho, medical experts, class members, and grass farmers. After hearing and weighing the evidence presented, the District Court issued findings of fact and conclusions of law in two orders. These findings of fact frame the issues here.

First, based on the testimony and thousands of pages of documents submitted at the hearing, the District Court issued an injunction against further grass burning. App. at 135a-139a. Significantly, the District Court found that the essential facts "are not really in dispute." App. at 131a. Further, the court found and explained:

> Clearly the farmers' burning of grass seed residue causes smoke. ***That smoke causes these citizen plaintiffs to have increased medical problems, some very serious, which in turn causes some of them to hole up in their homes or to leave the area completely during the period of burning.*** The medical testimony by Dr. Strimas and Dr. Covelli is corroborated by . . . Dr. David P. York and Dr. Timothy E. Bruya (both board certified pulmonologists in the immediate area). Also, the opinion that particulate matter from agricultural field burning increases the incidence of respiratory disease and cardiac disease, has been expressed by 87 Kootenai County physicians of various specialties, . . . and by 28 Bonner County physicians. . . . Their opinions are contradicted only by Dr. Moogavkar, a

> professor of epidemiology at the University of Washington, who testified there is no epidemiological or statistical evidence, based on a large population, as to the effects of field burning and health problems. But even Dr. Moogavkar admitted that "there is ***no doubt*** there are some individuals who are legitimately distressed" due to the smoke from grass field burning. That epidemiological evidence is given little weight by this Court compared to the testimony and affidavits of the physicians who actually ***treat*** people having respiratory problems during the field burning season. That "clinical evidence" (as opposed to epidemiological evidence) is ***overwhelming, and uncontradicted***."[2]

Id., at 209-10 (emphasis added except emphasis on "treat" in original). In short, the District Court found that Plaintiffs "have proven the smoke from field burning 'endangers the health' of themselves and their family members, and ***they have proven the smoke 'renders their premises unsafe for habitation' during periods when grass field smoke is present***." (App. at 138a) (emphasis added).

Significantly, one of the Defendants' counsel openly acknowledged that many Plaintiffs must abandon their homes

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2. The ***only*** clinical medical evidence the Defendants could muster over two days of hearings to rebut the wealth of Plaintiffs' clinical evidence was that of Dr. Tarnasky, a ***gynecologist***. The District Court found, after cross-examination, that the opinions of Dr. Tarnasky "regarding the relationship between grass field burning and pulmonary problems" were worthless and "accorded little if any weight" because (i) as a gynecologist, he possesses a "lack of foundation for any pulmonary opinion," and (ii) Dr. Tarnasky "***owns 220 acres which he leases to grass seed farmers who burn***" and thus is probably biased. App. at 155a (emphasis added). In contrast, over 100 north Idaho doctors called for an end to grass burning because of the health crisis it causes in north Idaho every year.

during the burn season. Defendant Wayne Meyer also testified that if his daughter had cystic fibrosis, he would move so his daughter would not be exposed to the grass smoke.[3]

Based on the presented evidence, the District Court concluded that field burning harmed Plaintiffs. The District Court found that Plaintiffs had proved injury and damage from Defendants' smoke and that their injuries were irreparable. App. at 136a-137a.[4]

The State of Idaho also knows that the Farmers' burning adversely impacts Plaintiffs' property and health. For example, during each of the 2000, 2001 and 2002 burning seasons, the Idaho Department of Environmental Quality received about 1000 telephone calls from people registering their complaints about the burning of Kentucky bluegrass fields. In addition to demonstrating the scale of impact of Defendants' conduct, these complaints also evidence that children and adults are hospitalized and regularly evacuated from the area to protect their health and well being during Defendants' burning.

Also based on the evidence presented during the hearing, the District Court found, as a factual matter, that field burning is not necessary to grow Kentucky bluegrass. App. at 192a-194a. Burning bluegrass fields is simply a cheap way to remove grass residue.

It was these factual findings, combined with others, that led the District Court to conclude that an injunction must issue

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3. Thus, at least one of the defendants, who is also an Idaho legislator, has acknowledged that he would also be forcibly evicted from his home during the burn season if his child had cystic fibrosis.

4. The State of Washington concurred in the District Court's assessment. Indeed, Washington banned field burning precisely because of the health consequences. And though Washington has banned grass field burning, the bluegrass acreage grown in Washington has increased and seed yields harvested have remained about the same.

to abate the injury caused by the Defendants' field burning. The District Court explained:

> If further damage occurs to these citizens, either through degradation in health, shortening of life, the permanent effect of steroid use, or needing to move away for weeks at a time each year, it would have a "tendency to render ineffectual" any judgment they may recover, ***because a money judgment cannot restore health, cannot restore life expectancy, cannot repair permanent damage to the body and cannot restore time spent away from home.***

App. at 142a (citing *Gilpin v. Sierra Nevada Consol. Mining Co.*, 23 P. 547, 552 (Idaho Sup. Ct. 1890) (emphasis added).

On September 12, 2002, the Idaho Supreme Court enjoined the District Court from enforcing the terms of the preliminary injunction against the Farmers.

After the Supreme Court prohibited the District Court from enforcing the terms of the injunction, the parties engaged in over ten months of discovery and substantial motions practice, a class action was certified, Plaintiffs were granted leave to amend the complaint to assert a punitive-damage claim. Plaintiffs then filed a summary-judgment motion that was fully briefed and the District Court scheduled an additional evidentiary hearing to be held before the onset of the 2003 burn season to determine whether the Defendants could present facts and evidence that would convince the court that an injunction should not issue.

B. The Idaho Legislature Enacts I.C. § 22-4803A(6) to Immunize the Defendants From Liability in This Action

In response, the State of Idaho granted Defendants immunity from Plaintiffs' nuisance and/or trespass actions. During March 2003 it came to the Parties' and the District Court's attention

that the Idaho legislature was considering several bills related to field burning.

On April 11, 2003, the District Court held a hearing at which time the parties initially discussed the impact, if any, these bills might have on Plaintiffs' specific property and statutory rights to abate the nuisance and/or enjoin the trespass occasioned by the Defendants' smoke. The Defendants claimed that House Bill 391, which was subsequently enacted and codified at I.C. § 22-4803A(6), rendered preliminary injunctive relief inappropriate under the facts. In contrast, Plaintiffs argued that specifically applying HB 391 to the facts of this case would violate the Federal and Idaho constitutions in numerous ways. Accordingly, because the District Court and the parties desired to resolve this issue before holding the then-scheduled second injunction hearing, an expedited briefing schedule was established in the event that the Governor signed HB 391 into law.

HB 391/I.C. § 22-4803A(6) was created in "closed-door" meetings with the Governor's office, Representative Wayne Meyer, who is a grass burner and one of the defendants in this action, and Representative Jones, who is a lawyer for the Food Producers of Idaho. Incredibly, even though Representative Meyer is a defendant in this action, he not only voted in favor of I.C. § 22-4803A(6), ***he helped create the immunity provisions that he then asserted in his own case to evade liability***.

On April 23, 2003, the Governor of Idaho signed I.C. § 22-4803A(6), which, in relevant part, declared that "[field burning] conducted in accordance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute trespass." Idaho Code § 22-4803A(6) (hereinafter "immunity provision"). I.C. § 22-4803A(6) contained an emergency provision that made it effective immediately. App. at 38a.

Upon enactment, Plaintiffs challenged the immunity provision as unconstitutional as it applied to the facts of this

case. Plaintiffs specifically argued that the immunity provision constituted an uncompensated taking in violation of the Fifth Amendment of the U.S. Constitution and Art. I, sec. 14 of the Idaho Constitution.

C. The District Court Strikes I.C. § 22-4803A(6) As Unconstitutional

I.C. § 22-4803A(6) essentially gives a small group of privileged Defendants the right to do something that no other in our society can – irreparably injure innocent persons with absolute immunity. It was that immunity provision that Plaintiffs requested that the Idaho District Court declare unconstitutional as applied to the facts of this case.

In addition to its factual findings entered in support of its injunction against further grass burning, the District Court conducted another hearing and entered additional findings. It then found that the Defendants' smoke renders Plaintiffs' homes uninhabitable:

> Plaintiffs have proven through their medical evidence, that they cannot reside in their land during field burning without suffering injury . . . [and thus] the burning invades and ***destroys two of the three fundamental aspects of their property rights ... possession and use***. [App. at 46a (emphasis added).]

Based on these factual finding, the District Court declared I.C. § 22-4803A(6)'s immunity provision unconstitutional in light of the facts of the case because it "takes property without prior compensation or due process in violation of the Fifth and Fourteenth Amendment to the United States Constitution. . . ." App. at 40a. The District Court also acknowledged the strong presumption of constitutional validity and that courts are obliged to construe statutes to save them rather than declare them unconstitutional. *Id.*, at 39a-40a. And in the end, just like the

Iowa Supreme Court did with a similar immunity provision,[5] the District Court explained:

> By abolishing nuisance and trespass claims, the Idaho legislature placed these plaintiffs and class members in a situation where they are now powerless to enjoin the injury and damage suffered by grass field burning. By doing so, the Idaho legislature imposed a servitude on plaintiffs' property. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson*, 331 U.S. 745, 748 (1947). [*Id.*, at 43a-44a.]

The District Court thus found that Idaho imposed a servitude on Plaintiffs' property. According to the court, Plaintiffs' proof has established "that even when fields are burned in compliance with the [field burning] regulations, injury occurs." (App. at 43a.) The court further found that "Plaintiffs have proven through their medical evidence[] that they cannot reside [on] their land during field burning," (*id.*, at 46a), and that "even though field burning takes place in two months of the year, August and September, the burning invades and destroys two of the three fundamental aspects of their property rights . . . possession and use." *Id. See also id.*, at 82a ("plaintiffs have proved injury and an inability to use their property, caused by the defendants' smoke")).[6] Plaintiffs thus do *not* have exclusive possession or use of their property during August and September because of field burning.

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5. *See Bormann v. Board of Supervisors*, 584 N.W.2d 309, 322 (Iowa 1998), discussed *infra*. App. at 49a-50a.

6. *See also* App. at 68a-69a ("plaintiffs in the present case have not only alleged facts which show a nuisance, ***they have proven facts at one preliminary injunction hearing and proved a nuisance*** . . ."; emphasis added).

The District Court also ruled that by affirmatively granting the Defendants the right to maintain the nuisance on Plaintiffs' property, the State imposed an easement on these Plaintiffs' land. *Id.*, at 44a-45a (citing RESTATEMENT (THIRD) PROPERTY § 1.2(1) (2000); RESTATEMENT OF PROPERTY § 451 (1944)).[7] Indeed, the court further explained that "smoke traversing over and into plaintiffs' homes, or otherwise forcing them to abandon their homes, is an easement because it privileges the owner of one tenement [here, the Defendants] with a right to use the tenement of plaintiffs." *Id.*, at 44a n.2. The court further explained that under Idaho law, a right to use the land of another for a specific purpose is a "servitude imposed as a burden upon land." *Id.*

Citing *Eaton v. B. C. & M. R.R.*, 51 N.H. 504, 511 (1872), the District Court noted, it is "beyond the power of the legislature to authorize the infliction of this injury on the plaintiff, without making provision for his compensation" because burdening an owner's land with a nuisance (intermittent flooding) would be "an easement" that would have "already vested" in the defendant. App. at 47a (citing *Eaton*, 51 N.H. at 515). The District Court concluded that the defense of immunity, if granted under the facts, would be unconstitutional because it conveys an easement to the Defendants, which is a real property interest in Plaintiffs' lands. *Id.*

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7. The RESTATEMENT (THIRD) PROPERTY § 1.2(1) (2000) provides, "an easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement." Similarly, the RESTATEMENT OF THE LAW OF PROPERTY § 451, provides in relevant part, "An affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do." *See also* BLACK'S LAW DICTIONARY 527 (7th ed. 1999) (defining an easement as "an interest in land owned by another person, consisting in the right to use or control the land, or an area above or below it, for a specific limited purpose. . . . The primary recognized easements are . . . (6) ***a right to do some act that would otherwise amount to a nuisance*** . . ."; emphasis added).

The Defendants requested an interlocutory review of the court's ruling, which the Idaho Supreme Court accepted.

D. The Idaho Supreme Court Reverses And Finds I.C. § 22-4803A(6) Constitutional

On August 2, 2004, the Idaho Supreme Court reversed the District Court, ruling that HB 391/I.C. § 22-4803A(6) was not constitutionally infirm. Pertinent here, the court addressed the question whether "the district court err[ed] in finding HB 391 is an unconstitutional 'taking' of private property under both the Idaho and United States Constitutions?" App. at 8a. The court described the effect of the new law on Plaintiffs:

> This immunity thus entitles the grass farmers to invade the property of the plaintiffs' with the smoke from their burning fields, while preventing the plaintiff landowners from full possession, use, and quiet enjoyment of their land and denying them a remedy from the invasion from the farmers' smoke. [App. at 15a.]

The court concluded that this invasion without compensation was at most a regulatory taking, not a physical taking, because Plaintiffs' land was "not appropriated" and because the invasion did not result in "a loss of access or of any complete use of the property." *Id.* at 12a. And, according to the court, there was no regulatory taking because the invasion was not permanent. *Id.*

The court also faulted the Idaho District Court for finding that I.C. § 22-4803A(6) created an easement on Plaintiffs' properties based on the RESTATEMENT OF THE LAW OF PROPERTY, § 451. The supreme court declined to adopt the RESTATEMENT section as law of Idaho and thus concluded that the statute created no easement on Plaintiffs' properties in Defendants' favor. App. at 13a, 18a-19a. For this reason, the court distinguished and rejected the instructions of such authorities as this Court's

decision in *Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914), and the Iowa Supreme Court decision, *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 316 (Iowa Sup. Ct. 1998). App. at 15a-18a. The court then ruled that Plaintiffs had no vested right in any common-law cause of action and that the Idaho Legislature was free to abolish common-law causes of action. *Id.* at 18a-19a.

REASONS FOR GRANTING THE PETITION

This Court's Rule 10(b) states that an important test for accepting review on a writ of certiorari is when "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals."

The Idaho Supreme Court's decision satisfies this test. It decided an important federal question of constitutional law – whether a state can grant immunity from liability to private persons who have interfered with the private property rights of others and caused them significant injury – and its decision directly conflicts with decisions of this Court and other state supreme courts.

A. The Idaho Supreme Court Decided an Important Question Under the United States Constitution

The Idaho Supreme Court's decision strikes at the heart of Plaintiffs' rights under the Fifth Amendment to the U.S. Constitution. The Fifth Amendment provides that "no person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the U.S. Constitution prohibits any state from "depriv[ing] any person of life, liberty, or property without due process of law," thereby making the Fifth Amendment applicable to the states and their political subdivisions. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 232 (1897).

Plaintiffs' fundamental property rights are at the core of this litigation and Plaintfifs' Petition. Central to every concept of property are three principal powers: possession, use, and disposition. *United States v. General Motors Corp.*, 323 U.S. 373, 377-78 (1945). Plaintiffs' property rights include their right to access their home,[8] the right to exclusively possess their home,[9] and the right to use their home.[10] As this Court explained: "the 'right to exclude,' so universally held to be a fundamental element of the property right, falls within this category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States*, 444 U.S. 164, 179-80 (1979). Stated otherwise, any servitude or easement imposed on Plaintiffs' property as an estate in land constitutes "an actual physical invasion of the privately owned" home. *Id.* at 180. And if the State of Idaho sanctions conduct that renders the home uninhabitable or useless as a home, Plaintiffs' losses "would be as complete as if the [State of Idaho] had entered upon the surface of the land and taken exclusive possession of it." *See United States v. Causby*, 328 U.S. 256, 261 (1946).

The State of Idaho has done just this. As already explained, the Idaho District Court found, on an exhaustive factual record, that for two months of each year the Defendants' smoke extinguishes each one of these rights in their homes. The Defendants' smoke interferes with Plaintiffs' exclusive possession, use and enjoyment of their homes. For two months,

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8. *Hughes v. State*, 328 P.2d 397, 401 (Idaho Sup. Ct. 1958); *McMoran v. State*, 345 P.2d 598, 599 (Wash. Sup. Ct. 1959); *Jordan v. Canton*, 265 A.2d 96, 99 (Me. Sup. Ct. 1970).

9. *Kaiser Aetna*, 444 U.S. at 179-80.

10. "We have little difficulty accepting the theory that the use of valuable property . . . is itself a legally protectible property interest. Of the aggregate rights associated with any property interest, the right of use of property is perhaps of the highest order." *Dickman v. Commissioner*, 465 U.S. 330, 336 (1984).

the Defendants' smoke plumes are unwanted and dangerous invaders in Plaintiffs' homes. Some Plaintiffs are forced "to lock themselves in their homes during times of grass burning," while others, such as Plaintiff Alex Heisel, must "leave the area until burning is complete" – they are essentially evicted from their properties. App. at 163a.[11] The court explained that, "[P]laintiffs in the present case have not only alleged facts which show a nuisance, they have proven facts at one preliminary injunction hearing and proved a nuisance." App. at 68a-69a.

Yet the I.C. § 22-4803A(6) grant of immunity makes it impossible for Plaintiffs to stop or enjoin Defendants' smoke from invading their homes and interfering with their use and enjoyment thereof. The Idaho Supreme Court was blunt about this:

> [I.C. § 22-4803A(6)] entitles the grass farmers to invade the property of the plaintiffs' [*sic*] with the smoke from their burning fields, while preventing the plaintiff landowners from full possession, use, and quiet enjoyment of their land and denying them a remedy from the invasion from the farmers' smoke. [App. at 15a.]

Consequently, because the I.C. § 22-4803A(6) grant of immunity prevents Plaintiffs from enjoining what is a proven nuisance and trespass (the Defendants' smoke), and because

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11. It is be difficult to explain to those who do not live in the region the scale and impact of grass burning. This is not campfire smoke, vehicle exhaust, or even slash or wheat burning smoke. Grass burning produces smoke so thick that people cannot see across the street or to the backyard garden on a hot Idaho summer day. It blankets the streets and turns the day almost to night. *See* photographs at App. 198a-201a. It is also an annual event that causes children to forgo outdoor play in the latter part of the summer, forcing them instead to stay locked up inside their homes. Many Plaintiffs either must stay indoors or move away and abandon their homes during the two-month burn season. All Plaintiffs are affected.

the smoke renders their homes uninhabitable, unusable and unsafe, the immunity provision prevents Plaintiffs from protecting their right to exclusive possession. It has therefore created a servitude over Plaintiffs' property in favor of the Defendants. Stated otherwise, because the Defendants are immune from a nuisance and trespass suit and authorized to do irreparable harm to Plaintiffs and class members and their property interests, the State has "taken" their property in violation of the U.S. Constitution because it is solely by virtue of the immunity provision that Defendants may maintain the nuisance or trespass. The State has granted Defendants a property interest or easement in their land.[12] Plaintiffs' property interest is so fundamental and universal that the Idaho's attempt to authorize or immunize such conduct constitutes a "physical invasion" of the home and is an unconstitutional taking. *See Kaiser Aetna*, 444 U.S. at 179-80.

The Idaho Supreme Court ignored *Causby* and *Kaiser Aetna* altogether. In their briefing to the court, the Defendants had sought to distinguish *Kaiser* on the ground that *PruneYard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980), allegedly held that the "right to exclude others" is not so essential at to constitute a taking whenever the government "takes" that right. *PruneYard* is easily distinguished, however, because it involved competing fundamental rights – free speech and the Fifth Amendment – where the shopping mall as issue, despite the regulation, in fact retained its essential purpose and commercial

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12. *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327 (1922) (navy firing guns, or threatening to fire, over plaintiff's land imposed a compensable "servitude"); *Causby*, 328 U.S. at 261-67 (holding U.S. created an air easement that constituted a taking because the aircraft interfered with the use and enjoyment of land); *Tibbs v. City of Sandpoint*, 603 P.2d 1001, 1005 (Idaho Sup. Ct. 1979) (same); *Martin v. Port of Seattle*, 391 P.2d 540, 543 (Wash. Sup. Ct. 1964) (same; noise from jet aircrafts constitute a taking); *Buchanan v. Simplot Feeders Ltd. P'ship*, 952 P.2d 610, 615 (Wash. Sup. Ct. 1998); *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 316 (Iowa Sup. Ct. 1998).

enterprise; indeed, a shopping mall is intended to include co-tenants and other occupiers, encourage visits by strangers (with the hope that money will be spent at the mall), and is open to the public at large. But a mall is not a home. It is in one's home that a citizen can claim the right of privacy, the right to be let alone, and the right to exclude everyone else. *PruneYard* does not displace *Kaiser Aetna*.

Plaintiffs' natural, ***inalienable*** rights are at stake as well. Courts have long recognized that a statute authorizing a private nuisance creates a servitude or easement. *Boomer v. Atlantic Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970) ("the 'servitude on land' of plaintiffs imposed by defendant's nuisance") (citing *United States v. Causby*, 328 U.S. 256, 261 (1946)); *Bormann v. Board of Supervisors*, 584 N.W.2d 309, 316 (Iowa Sup. Ct. 1998); BLACK'S LAW DICTIONARY 527 (7th ed. 1999). Likewise, a trespass, if authorized by statute, is simply another definition of an easement. RESTATEMENT OF PROPERTY § 451, at 2911-12; *Quintain Dev. v. Columbia Natural Res.*, 556 S.E.2d 95, 102 (W. Va. 2001); *see also Beatty v. United States*, 203 F. 620, 626 (4th Cir. 1913) (noting that government condemnation for a public purpose "is in effect a lawful trespass committed by the sovereign"). Although, as the Idaho Supreme Court noted, the Idaho Legislature may abolish certain causes of action (App. at 18a-19a), it thus may not abolish or immunize a trespass. To do so is tantamount to authorizing interference with the exclusive right to possession of one's home, which is a per se physical taking. *Kaiser Aetna, supra*.

The Idaho Supreme Court, in vacating the District Court's decision and affirming I.C. § 22-4803A(6), declined to label the Defendants' annual and injurious use of Plaintiffs' property as an "easement" under Idaho law. App. at 18a-19a. But the court's refusal to deem Defendants' regular use of Plaintiffs' property as an easement is a mere sleight of hand that does not change this result. Regardless of the label given Defendants' use, I.C. § 22-4803A(6) grants Defendants the right to use

Plaintiffs' land for two months each year in a way that irreparably harms Plaintiffs. Whether or not labeled an "easement," I.C. § 22-4803A(6) took fundamental property rights from Plaintiffs and gave them to Defendants.

The Idaho Supreme Court embraced the notion that the State of Idaho could redefine Plaintiffs' property interests without concern for constitutional implications based likely on Defendants' argument that property interests are defined solely by the State of Idaho. But that argument is incorrect. Defendants cited to *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980), for support. *Webb's* does not, however, stand for such a proposition. This Court actually said that property rights are created and defined by "existing rules or understandings that stem from" a source independent from the Constitution "such as state law." *Id.* State law is thus but one example of the "independent sources" from which property interests are created – it is not the sole independent source. If it were the sole source, then any state could do exactly what this Court forbade in *Webb's*, namely, take private property in violation of due process by simply excluding from the definition of "property" protected under state law the kind of private property that the state wished to take.

In *Webb's*, the State of Florida had declared that interest income was not the property of the owners of principal. The Supreme Court, however, far from viewing itself as bound by the state-law determination, overruled it:

> Neither the Florida Legislature by statute, nor the Florida courts by judicial decree, may accomplish the result the county sought simply by recharacterizing the principal as "public money" because it is held temporarily by the court. ***The earnings of the fund are incidents of ownership of the fund itself and are property just as the fund itself is property***. The state statute has the practical effect of appropriating for the county the value of

> the use of the fund for the period in which it is held in the registry.
>
> To put it in another way: a State, by ipse dixit, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. ***This is the very kind of thing that the Takings Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power***. [449 U.S. at 164 (emphasis added.]

Webb's thus stands for the notion that states do not solely determine what is property for takings purposes. If it were otherwise, then the very governments responsible for their violation could extinguish the rights secured by the people, and the rights of U.S. citizens would vary on a case-by-case basis depending on the state where the constitutional protection is sought. It is not the case that the Fifth Amendment protects property rights in Boise less than in Chicago. Moreover, inalienable rights such as those granted by natural law and essential to this Court's concept of freedom stem from a source independent of state law.

The Idaho Supreme Court also declined to label the Defendants' state-sanctioned use of Plaintiffs' property as a physical taking. App. at 12a. According to the Idaho court, there was no taking because "the plaintiffs' land is not appropriated and because the smoke complained of does not result in a loss of access or of any complete use of the property." App. at 12a. That, of course, disregards the District Court's sharply contrary factual findings. The Idaho Supreme Court instead deemed Defendants' use a "regulatory taking" that was not actionable because Plaintiffs "have not claimed a permanent deprivation of all economically beneficial uses of their land." *Id.* at 13a. For support, the court cited *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002).

But the Idaho court misapplied these authorities. First, Justice Kennedy stated in *Lucas* that '[i]t is well established that temporary takings are as protected by the Constitution as are permanent ones." *Lucas*, 505 U.S. at 1033 (Kennedy, J., concurring). Indeed, this Court stated in *Brown v. Legal Found.*, 538 U.S. 216, 233 (2003), that "compensation is mandated when a leasehold is taken and the government occupies the property for its own purposes, even though that use is temporary."

Next, there is a distinction between physical takings and regulatory takings that results in different analysis. Indeed, the Court explained in *Tahoe-Sierra Preservation Council* that this distinction is found in the Constitution:

> The text of the Fifth Amendment itself provides a basis for drawing a distinction between physical takings and regulatory takings. Its plain language requires the payment of compensation whenever the government acquires private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation. But the Constitution contains no comparable reference ***to regulations that prohibit a property owner from making certain uses of her private property***. [535 U.S. at 321-22 (emphasis added).]

Accordingly, if the State of Idaho acquires a private-property interest and puts that interest to use to serve a public purpose, it must then compensate the owner in all cases. But under the regulatory-taking analysis, when the government merely ***restricts the use of property*** (*e.g.*, via zoning laws), courts determine whether a taking has occurred based on a different set of principles.

Here, I.C. § 22-4803A(6) took a private interest in Plaintiffs' lands and transferred it to Defendants to serve some "public interest." But I.C. § 22-4803A(6) is not a law or regulation

directed to Plaintiffs designed to limit their uses of their properties. By granting Defendants the right to use Plaintiffs' airspace and homes, it constitutes a physical appropriation of Plaintiffs' property via a possessory interest; it is ***not*** a regulatory restriction on Plaintiffs' use of their property. *See Causby*, 328 U.S. at 261-64. Indeed, *Tahoe-Sierra* recognized that when a State affirmatively grants a possessory interest in one person's land to another it is a per se violation of the Constitution. *See* 535 U.S. at 322. And "even though that use is temporary," it is a categorical taking. *Id.* Under the facts of this case, regulatory-takings analysis is inapplicable.

> [I.C. § 22-4803A(6)] entitles the grass farmers to invade the property of the plaintiffs' [*sic*] with the smoke from their burning fields, while preventing the plaintiff landowners from full possession, use, and quiet enjoyment of their land and denying them a remedy from the invasion from the farmers' smoke. [App. at 15a.]

B. By Affirming I.C. § 22-4803A(6), The Idaho Supreme Court Decided The Constitutional Question Contrary to Other State Supreme Courts

The Idaho Supreme Court's decision that the State of Idaho could grant immunity to Defendants for trespassing and nuisance on Plaintiffs' properties without paying compensation is squarely contrary to decisions of this Court and other state supreme courts. It has long been the law that the U.S. Constitution limited legislators' power to control private nuisances:

> the power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably. . . . It has been broadly stated, as an additional limitation to the power of the legislature, that . . . the legislature may not

> authorize the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation. [66 C.J.S. NUISANCES § 7, at 738 (1950).]

Most recently, in *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa Sup. Ct. 1998), the Iowa Supreme Court embraced these principles. It thoroughly reviewed the case law and commentary concerning the authority of any state or agency to authorize a private nuisance and ruled the immunity provision in the Iowa Right to Farm Act ("RTFA") was unconstitutional:

> Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.
>
> *Pennsylvania R.R. v. Angel*, 7A. at 433-34.
>
> Our own definition of a taking is in accord with this concept:
>
> [A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.
>
> *Phelps v. Board of Supervisors of County of Muscatine*, 211 N.W.2d 274, 276 (Iowa 1973)

(holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than previously was a "taking" within the meaning of the Iowa Constitution).

As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of [RTFA]. The approval gave the applicants immunity from nuisance suits. . . . This immunity resulted in the Board's taking of easements in the ***neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution***. . . .

In enacting [RTFA], the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and article I, section 18 of the Iowa Constitution. [*Id.* at 320-21.]

Recognizing the popularity of the law it was invalidating, the Court acknowledged that the "political and economic fallout from our holding will be substantial." *Id.* at 322. It accepted this consequence "because the challenged scheme is plainly – we think flagrantly – unconstitutional." *Id.* at 320-22. In words

that precisely described I.C. § 22-4803A(6), *Bormann* described the essence of the constitutional violation:

> the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers. [*Id.*]

The court thus remanded for an order "declaring that portion of [the RTFA] that provides for immunity against nuisances unconstitutional and without any force or effect." *Id.* at 321-22.

Bormann followed a long line of cases from this and other courts. This Court firmly established the core principle from *Bormann*, holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards v. Washington Terminal Co.*, 233 U.S. 546, 553 (1914) (smoke from a locomotive).

Richards reaffirmed *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church*, 108 U.S. 317 (1883), where the private defendant also argued that its conduct was authorized by statute. This Court emphatically rejected this contention, stating "[i]t is no answer to the action of the plaintiff that the railroad company was authorized by act of Congress. . . ." *Id.* at 330. *Fifth Baptist Church* reasoned that the Congressional grant of authority did not explicitly authorize the defendant to conduct its activities "without reference to the property and rights of others." *Id.* at 331. Furthermore, the Court emphasized that read into every grant of statutory authority is an "implied qualification" not to injure others in the use of their properties:

> Whatever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their

> use to unreasonabl[y] interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. ***The great principle of the common law***, which is equally the teaching of Christian morality, ***so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.*** [*Id.* (emphasis added).[13]]

To be sure, the Court emphasized that not all inconveniences would be actionable under an express grant from Congress. In particular those that only produce "incidental inconvenience which unavoidably follows" and are attendant to an authorized use operated in a reasonable manner is damage without injury. *Id.* The facts of the case indicated, however, that the defendant used its property unreasonably to disturb and annoy plaintiff. More importantly, the Court emphasized that it had "grave doubt" whether Congress could immunize the company from liability for invading others' properties:

> It admits indeed of grave doubt whether Congress could authorize the company to occupy and use any premises within the city limits, in a way which would subject others to physical discomfort and annoyance

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13. *See also Lorenzi v. Star Mkt. Co.*, 115 P. 490, 493 (Idaho Sup. Ct. 1911) ("[i]t should be remembered that this property belongs to appellant, and that it has a right to use it in any lawful manner in which it sees fit to employ its property, ***so long as it does not injure or damage anyone else***"; emphasis added); *Tiegs v. Watts*, 954 P.2d 877, 884 (Wash. Sup. Ct. 1998) ("[n]o one has a right to pursue even a lawful business if that person injures a neighbor without compensating the neighbor for the damages sustained"); *Gay v. Taylor*, 19 Pa. D. & C. 31, 35-41 (Pa. Cty. Ct. 1932) (discussing the true rule applied to nuisance and trespass claims); *Toledo Disposal Co. v. Ohio*, 106 N.E. 6, 8-9 (Ohio Sup. Ct. 1914) (same).

> in the quiet use and enjoyment of their property, and at the same time exempt the company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that ***such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the corporation for its purposes, without causing such discomfort and annoyance***. [*Id.* at 331-32 (emphasis added).]

The Court then expressly stated that the only acts a legislature may validly authorize, "which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control" – *i.e.*, public nuisances. *Id.* at 332. The reason is simple: legislative authorization only exempts liability from State actions; "it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." *Id.* Indeed, the Court concluded that such authorization cannot immunize private actors that create a nuisance from injured parties:

> The fact that the smokestacks of the engine house were as high as the city regulations for chimneys required, is no answer to the action, if the stacks were too low to keep the smoke out of the plaintiff's church. ***In requiring that chimneys should have a***

> ***certain height, the regulations did not prohibit their being made higher, nor could they release from liability if not made high enough. It is an actionable nuisance to build one's chimney so low as to cause the smoke to enter his neighbor's house.*** [*Id.* at 334-35 (emphasis added).]

Similarly, here, before I.C. § 22-4803A(6), no provision of the Idaho Code authorized the Defendants' conduct without regard to the rights of others. Moreover, no Idaho statute requires the Defendants to burn; it is still their choice. Nor does any statute prohibit the Defendants from "making their chimneys higher."

Moreover, these rules are longstanding and uniformly recognized – until now. *Fifth Baptist Church* and *Richards* are not anomalous or unique. The laws of this country have been clear for well over a century. Consider, for example, *Pennsylvania R. Co. v. Angel*, 7 A. 432 (N.J. Ct. App. 1886) (cited with approval in *Richards* and *Bormann*), where the court rejected a defendant's argument that its actions were excused because the legislature had authorized its conduct:

> [*A*]***n act of the legislature cannot confer*** upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, ***any right to deprive persons of the ordinary enjoyment of their property***, except upon condition that just compensation be first made to the owners. This principle rests upon the express terms of the constitution. In declaring that private property shall not be taken without recompense, that instrument secures to owners, not only the possession of property, but also those rights which render possession valuable. Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that

> it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense; of course, mere statutory authority will not avail for such an interference with private property. [*Id.* at 433-34 (emphasis added).]

Given the holdings of *Richards*, *Fifth Baptist Church*, *Angel* and *Bormann*, I.C. § 22-4803A(6)'s grant of immunity affirmed by the Idaho Supreme Court under the facts of this case is plainly unconstitutional. Indeed, Plaintiffs are aware of no other court in the country that has authorized or immunized anyone for knowingly causing irreparable injury to innocent children and adults while in the privacy and security of their own homes. To do so would contravene the great and most fundamental principles of this nation:

> Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. [*Fifth Baptist Church*, 108 U.S. at 331.]

Without doubt, I.C. § 22-4803A(6) interferes with fundamental constitutionally protected rights, just as the Idaho District Court ruled, and exceeded the Idaho Legislature's authority. By affirming the provision and reversing the Idaho District Court ruling, the Idaho Supreme Court stands alone and is in conflict with federal and state courts in allowing such a trammeling of constitutionally protected property rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE SUPREME COURT OF THE STATE OF IDAHO FILED AUGUST 2, 2004

IN THE SUPREME COURT OF IDAHO,

Boise, May 2004 Term

2004 Opinion No. 103

Filed: August 2, 2004

Frederick C. Lyon, Clerk

LAWRENCE ("BUD") MOON, JR., individually and on behalf of all others similarly situated, ALEX H. MOON, by and through her parents and guardians, TRINA H. MOON, and JAMES H. MOON, individually and on behalf of all others similarly situated, KALEY F. MOON, by and through her parent and guardian, LAURA F. MOON, individually and on behalf of all others similarly situated, JEANNE WOLCOTT, individually and on behalf of all others similarly situated, JERRY VICKERS, individually and on behalf of all others similarly situated, BRUCE CHARLES ROTHERMEL, individually and on behalf of all others similarly situated,

Plaintiffs-Respondents,

v.

Appendix A

NORTH IDAHO FARMERS ASSOCIATION; WAYNE MEYER, WILLIAM DOLE, MICHAEL DOLE, WARREN DOLE, JACQUOT FARMS ENTERPRISES, INC., SATCHWELL FARMS, INC., WALLACE MEYER, TERRELL K. BAUNE, BAUNE FARMS, INC., PAUL DESHIELL, ARNOLD BRINCKE KEITH DAMAN, PAUL DAMAN, DENNY BROS., L.L.C., CHAD DENNY, MATTHEW DRECHSEL, DRESCHSEL BROTHERS, INC., DENNIS DUNCAN, DAVID DUNCAN, CHRIS DUNCAN, JOYCE DUNCAN, RANDY DUNCAN, DAVID FISH, THOMAS FREEBURG, DAVID GUMM, CHARLES A. HAHNER, HAHNER FARMS, INC., LARRY HANSEN, JOYCE HANSEN, MARTIN HANSON, HATTER CREE FARMS, INC., DON HAY, CLARENCE HAEG, RANDY HOLT, DUANE JENNESKENS, CINDY JANNESKENS, DALE R. JOHNSON, TED LACY, PHILLIP LAMPERT, NICK LAWSON, CASEY LAWSON, ALLEN LEWIS, MAPLE LEAF FARM, INC., HERBERT W. MILLHORN, MILLHORN FARMS, INC., BRUCE MILLS, RICHARD MORRISON, ELMER NESS, CHRIS R. RAM, MICHAEL ROECKS, ROGADA FARMS, INC., JOHN SCHULTZ, KARL SCHULTZ, TAMMY SCHULTZ, RON TEE, ALLEN THOMA, WINDY HILL FARM, INC., TODD F. WRIGHT, GARY WRIGH, WRIGHTS, INC.; WADE MCLEAN, DOUG BRUCE, ERLING PLACE, MICHAEL SCHLEPP, GARY FRENCH; LAMPERT FARM RANCH, INC., EARL CLAUSEN, MICHAEL LA SHAW, CATHERINE MORRIS, TERRY NICHOLS, EUGENE TOWNE, JEFF BLOOMSBURG, BRIAN LA SHAW, JOE SIEVERS; BERGEN BOTHMAN,

Defendants-Appellants,

Appendix A

and

SCHLEPP RANCH, CLAUSEN FARMS, INC., LARRY HEATON, DAVID LAMPERT, ERIC LARSON and the STATE OF IDAHO,

Defendants.

LAMPERT FARM & RANCH, INC., EARL CLAUSEN, MICHAEL LA SHAW, CATHERINE MORRIS, TERRY NICHOLS, EUGENE TOWNE, JEFF BLOOMSBURG, BRIAN LA SHAW, LARRY HEATON AND JOE SIEVERS; G. WADE MC LEAN, DOUG BRUCE, MICHAEL SCHLEPP, GARY FRENCH AND ERLING PLACE,

Third-Party Plaintiffs-Appellants,

v.

TIM FREEBURG and MICHAEL FREEBURG; HENRY BENTZ, CHESTER FRANZ, d/b/a DOUBLE F. RANCH, MICHAEL HEMKEN, HEMKEN FARMS, INC., TERRY JACKLIN AND WALTER MEYER,

Third-Party Defendants-Appellants,

and

Appendix A

SHERRY CLAUS, as personal representative of the Estate of JOHN CARTER, GARY JOHNSON, d/b/a D & G FARMS, DAMAN BROTHERS PARTNERSHIP, GARY DRESHEL, d/b/a RESHEL BROTHERS, JIM FISCHER, FORD GUMM, ALVIN HAAS, HAAS FARMS GENERAL PARTNERSHIP, FRANCIS HUGHES, J.R. SIMPLOT COMPANY, d/b/a JACKLIN SEED-SIMPLOT, RODNEY JACOT, TED LACY, d/b/a LACY FARM ENTERPRISES, THELMA MC CLELLAN, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF L.E. MC CLELLAN, WILLIAM MELLICK, WALTER MEYER, GLEN MILES, MORRFARMS, INC., HEATON FARMS PARTNERSHIP, KSH PARTNERSHIP, GERALD HOLT d/b/a ROCKCREEK,

Third-Party Defendants.

Appeal from the District Court of the First Judicial District, State of Idaho, Kootenai County. Hon. John Thomas Mitchell, District Judge.

The Court upholds the amendments to I.C. § 22-4801 et seq., as constitutional according to the Idaho and United States Constitution

BURDICK, Justice.

The defendant-seed growers are appealing the district court's decision holding the amendments to *I.C. § 22-4801* et seq., which were passed by the 2003 Legislature, unconstitutional. This Court granted a permissive appeal of

this interlocutory order. For the reasons outlined below, we hold the recently enacted amendments to be in conformity with the Idaho and United States Constitutions.

FACTUAL AND PROCEDURAL BACKGROUND

The plaintiffs are individuals claiming sensitivity to grass smoke, who filed an action against various seed growers in north Idaho who traditionally burn the post-harvest straw and stubble in their fields as part of their farming activities. The plaintiffs' complaint, filed in June of 2002, asserted among others, claims of nuisance and trespass. The plaintiffs filed for a preliminary injunction in July of 2002, seeking to enjoin the defendant-seed growers from burning their Kentucky bluegrass fields. The district court, in August 2002 took testimony from the plaintiffs' medical experts, State officials from Washington and Idaho, class members and grass farmers. The district court issued findings of fact and conclusions of law and ultimately granted the preliminary injunction to abate the injury caused by the field burning of the grass farmers and required the posting of a bond.

In September of 2002, however, the Idaho Supreme Court granted the defendant-seed growers' request for a writ of prohibition, after concluding that the injunction exceeded in some respects the district court's jurisdiction. The Court enjoined the district court from enforcing the terms of the preliminary injunction against the grass burners.

Appendix A

The plaintiffs sought and were granted certification as a class[1] and were granted leave to amend their complaint to assert a punitive damage claim. Thereafter, in the early spring of 2003, several bills related to field burning were under consideration by the Idaho legislature. The district court held a hearing on April 11, 2003, where the impact of the various bills was discussed with respect to the plaintiffs' property and their statutory rights to abate the nuisance and/or enjoin the trespass caused by the grass burners' smoke.

In April 2003, after Governor Kempthorne signed House Bill 391 into law, the plaintiffs filed a motion to the district court to declare the law unconstitutional as applied to the facts of this case. HB 391, which was passed as an emergency measure, amended the Smoke Management and Crop Residue Disposal Act of *1999*, *I.C. § 22-4801 et seq.*, and effectively extinguished liability for all North Idaho grass farmers that burn in compliance with its provisions. Of particular significance, HB 391 amended portions of *I.C. § 22-4803* and added a new statute, *I.C. § 22-4803A*.

The district court heard the motion of the plaintiffs, arguing the unconstitutionality of *I.C. § 22-4803A(6)*, which reads as follows:

> (6) Crop residue burning conducted in accordance with *section 22- 4803 Idaho Code*, shall not constitute a private or public nuisance or constitute trespass. Nothing in this chapter shall be construed to create a private cause of action

1. The plaintiffs were granted class certification by the order of the district court dated April 28, 2003.

> against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to *section 22-4803(3) Idaho Code*, provided such activities are conducted in accordance with chapter 49, title 22, Idaho Code, and rules promulgated thereunder.

On June 4, 2003, the district court issued an order holding HB 391 unconstitutional. The district court held: (1) that HB 391 effects an unconstitutional taking of property without prior compensation or due process; (2) that HB 391 imposes a limitation that is not in the interests of the common welfare and thus violative of *Article I, § 1 of the Idaho Constitution*; and (3) that HB 391 is a "local or special law" in violation of *Article III, § 19 of the Idaho Constitution*. The district court concluded that for two months of the year, August and September, "the burning invades and destroys two of the three fundamental aspects of the plaintiffs' property rights ... possession and use." The district court also ruled that by affirmatively granting the grass burners the right to maintain the nuisance on the plaintiffs' property, the State imposed an easement on the plaintiffs' land.

The district judge who ruled on the constitutionality of the statutory amendments, particularly I.C. § 22-4806, was disqualified by order dated June 12, 2003. By order of the Idaho Supreme Court dated June 28, 2003, the Honorable District Judge W.H. Woodland was appointed to take over the case. Shortly thereafter, the district court granted the defendants' motion to stay the proceedings until the Supreme Court determines the motion for a permissive appeal of the interlocutory order pursuant to *I.A.R. 12(a)*. The Idaho

Appendix A

Supreme Court granted the motion for permissive appeal on July 22, 2003.

ISSUES ON APPEAL

1. Did the district court err in finding HB 391 is an unconstitutional "taking" of private property under both the Idaho and United States Constitutions?

2. Did the district court err in finding that HB 391 is a violation of *Article I, § 1 of the Idaho Constitution*, because the "limitation" imposed by the amendments were not in the "interests of the common welfare"?

3. Did the district court err in finding the HB 391 is a "local or special law" in violation of *Article III, § 19 of the Idaho Constitution*?

STANDARD OF REVIEW

The constitutionality of a statute is a question of law over which this Court exercises free review. *State v. Cobb*, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998); *Fremont-Madison Irr. Dist. and Mitigation Group v. Idaho Ground Water Appropriators, Inc.*, 129 Idaho 454, 926 P.2d 1301 (1996). The party challenging a statute on constitutional grounds bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity." *Olsen v. J.A. Freeman Co.*, 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Courts are obligated to seek an interpretation of a statute that upholds its constitutionality.

State v. Newman, 108 Idaho 5, 13, 696 P.2d 856, 864 (1985). The judicial power to declare legislative action invalid upon constitutional grounds is to be exercised only in clear cases. *State ex rel. Brassey v. Hanson*, 81 Idaho 403, 406, 342 P.2d 706, 709 (1959).

DISCUSSION

I.

HB 391 affected amendments to portions of I.C. §§ 22-4801, - 4803 and -4804 and added an entirely new section, I.C. § 22-4803A. The plaintiffs' motion dated April 30, 2003, challenged the constitutionality of HB 391 in several respects.

In asserting their challenge to the statute, the plaintiffs contended that the immunity conferred by I.C. § 22-4803A(6) to the grass farmers who burn their fields results in a taking of private property without the payment of compensation in violation of federal and state constitutional provisions. The statute at issue provides in relevant part: "Crop residue burning conducted in accordance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute a trespass." The district court determined that I.C. § 22-4803A(6) is unconstitutional because it takes property without prior compensation in violation of the Fifth Amendment to the federal Constitution.

The just compensation clause of the Fifth Amendment of the United States Constitution provides that no person shall "be deprived of life, liberty, or property, without due process of law, nor shall private property be taken for public

use, without just compensation." The Idaho Constitution also guarantees its citizens the right of due process if private property is taken for a public use, pursuant to Article I, § 13, and provides for just compensation for such a taking, pursuant to Article I, § 14. The question this Court must answer, then, is whether the grant of immunity to the grass farmers can be deemed a "taking" from the plaintiffs. In other words, have the plaintiffs been deprived, by the statute, of their common law right to bring a nuisance action and/or a trespass action, without remuneration.

Idaho case law has defined "trespass" to apply to the wrongful interference with the right of exclusive possession of real property, while the tort of private "nuisance" applies to the wrongful interference with the use and enjoyment of real property. *Mock v. Potlatch Corp.*, 786 F.Supp. 1545 (D.Idaho 1992). *See also Carpenter v. Double R Cattle Co., Inc.*, 105 Idaho 320, 669 P.2d 643 (Ct.App.1983) ("But where an invasion of property is merely incidental to the use of adjoining property, and does not physically interfere with possession of the property invaded, it generally has been classified as a nuisance rather than a trespass."); I.C. § 52-101 (defining nuisance as "anything which is injurious to health [...]or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property."). A useful differentiation between trespass and nuisance is found in a case that the district court found to be squarely on point, in which the Iowa Supreme Court noted: "Trespass comprehends an actual physical invasion by tangible matter. An invasion which constitutes a nuisance is usually by intangible substances, such as noises or odors." *Bormann v. Board of Supervisors*, 584 N.W.2d 309 (Iowa

1998), *cert. den. sub nom*, *Girres v. Bormann*, 525 U.S. 1172, 119 S.Ct. 1096, 143 L.Ed.2d 96 (1999), *citing Ryan v. City of Emmetsburg*, 232 Iowa 600, 603, 4 N.W.2d 435, 439 (1942). Thus, in the plaintiffs' situation, an action could be said to lie in nuisance and in trespass, respectively, given the invasion of the thick, oppressive smoke generated by the farmers' burning and the particulates emitted from the smoke onto the plaintiffs' land.

In *Covington v. Jefferson County*, 137 Idaho 777, 53 P.3d 828 (2002), the increased noises, offensive odors, dust, flies, and litter caused by the operation of the landfill near the Covingtons' property formed the basis of their claim of inverse condemnation. In their amended complaint, they alleged that their property was impaired by the operation of the landfill by an amount in excess of 25% of the property's total value, which they claimed amounted to a taking for which they were entitled to compensation. The Court analyzed the elements of the claim, including whether the Covingtons' property was invaded or appropriated to the extent of a taking, and determined as a matter of law that the Covingtons had failed to allege a taking under either the state or the federal constitution. *Id.* at 780, 53 P.3d at 831.

According to the *Covington* court, before an owner is entitled to compensation for a violation of Article I, § 14 of the Idaho Constitution, his property must be "taken" and not merely "damaged." *Id.* at 781, 53 P.2d at 832, *citing Powell v. McKelvey*, 56 Idaho 291, 307, 53 P.2d 626, 632- 33 (1935). This conclusion was based on the language of the constitutional provision that contains only the word "taken" and which has not authorized the collection of damages where

there is no actual physical taking of the property. *Id.* at 780, 53 P.3d at 831, *citing Idaho-Western Ry. Co. v. Columbia Conference of Evangelical Lutheran Augustana Synod*, 20 Idaho 568, 584- 85, 119 P. 60, 65 (1911). The Court also held that under the United States Constitution, a physical invasion or a regulatory taking, which permanently deprives the owner of "all economically beneficial uses" of his land, requires compensation. *Id.*, *citing Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798 (1992).

The case presently before the Court is not an inverse condemnation case but as in Covington, deals with a regulatory taking. *Covington*, 137 Idaho at 781, 53 P.3d at 832. Although a footnote in *Covington* indicates that "[t]his activity may constitute a nuisance claim which is not before this court," the opinion does not address whether the elimination of such a nuisance claim by act of the legislature could or could not be deemed a taking. The determination of whether or not there was a taking is a matter of law to be resolved by the trial court. *Rueth v. State*, 100 Idaho 203, 596 P.2d 75 (1979). *The trial court should also determine the nature of the property interest so taken. Tibbs v. City of Sandpoint*, 100 Idaho 667, 670, 603 P.2d 1001, 1004 (1979).

The taking asserted by the plaintiffs is not a physical taking because the plaintiffs' land is not appropriated and because the smoke complained of does not result in a loss of access or of any complete use of the property. *See Hughes v. State of Idaho*, 80 Idaho 286, 328 P.2d 397 (1958) (impairment of a right of access constituted a 'taking of property'). *See also Covington*, *supra* (where there has been

no loss of access to or denial of any use of the Covingtons' property). The taking asserted then, is in the nature of a regulatory taking, but the plaintiffs have not claimed a permanent deprivation of all economically beneficial uses of their land. As such, under the Idaho Constitution, which does not allow less than a total deprivation of use or denial of access, and under *Lucas*, 505 U.S. 1003, 112 S.Ct. 2886, 120 L.Ed.2d 798, there is no taking in violation of the state or the federal constitution. *See also Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, et al.*, 535 U.S. 302, 122 S.Ct. 1465, 152 L.Ed.2d 517 (2002) (holding no categorical taking had occurred because the regulations had only a temporary impact on the petitioners' fee interest in the properties); *cf. Renninger v. State, et al.*, 70 Idaho 170, 213 P.2d 911 (1950) (a taking requiring just compensation occurs when the state inflicts permanent and irreparable injury on land).

The district court, in analyzing the extent of the taking, concluded that "[a]ny destruction, interruption, or deprivation by the common, usual and ordinary use of property is by the weight of authority a taking of one's property in violation of the constitutional guaranty." *Knowles v. New Sweden Irr. Dist.*, 16 Idaho 217, 231, 101 P. 81, 86 (1908), *as cited in Hughes v. State*, 80 Idaho 286, 294, 328 P.2d 397, 401 (1958). As noted above, the destruction of access and deprivation of the use of property may be compensable, but the mere interruption of the use of one's property, as it is less than a permanent (complete) deprivation, does not mandate compensation. This Idaho authority relied upon by the district court has since been overruled by the Supreme Court's interpretation of the scope of a taking. *Covington, supra.*

Appendix A

The district court also relied on *Renninger v. State*, 70 Idaho 170, 213 P.2d 911 (1950), for the proposition that just compensation is warranted even when the taking is intermittent. This proposition is derived from cases cited in Renninger holding that where a structure causes 'permanent liability to intermittent but inevitably recurring overflows' it is taking. *Id.*, *citing Sanguinetti v. United States*, 264 U.S. 146, 44 S.Ct. 264, 68 L.Ed. 608 (1924). The physical structure in Sanguinetti was a dam, and the servitude created by reason of the intermittent overflow was held to be a partial taking. See id. In Renninger, the structure that led to injury to the land was a bridge—distinguishing it from the smoke created by the field burning in the case at hand.

Another proposition cited by the district court, which is not the holding of Renninger, is a quote from *Pumpelly v. Green Bay & Mississippi Canal Co.*, 13 Wall. 166 (1871):

> where real estate is actually invaded by superinduced additions of water, earth, sand or other material ... so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly not with sound principle.

Id. at 181. Rather, in *Renninger*, where the plaintiff sought to recover damages in inverse condemnation for the injury caused by the bridge built by the State, the Court held that when the state inflicts permanent and irreparable injury on the land without making any compensation, there is a violation of Article I, § 14 of the Idaho Constitution. The district court's reading of Renninger is inaccurate.

Appendix A

Next, the district court concluded that the right to maintain a nuisance is an easement, citing the Restatement of Property § 451, at 2912 (1944), *which provides: "An affirmative easement entitles the owner thereof to use the land subject to the easement by doing acts which, were it not for the easement, he would not be privileged to do." As explained by the comments to* § 451:

> In many cases, the use an owner of an affirmative easement is entitled to make enables him to intrude upon the land subject to the easement in ways which, were it not for the easement, would make him a trespasser upon the land. On the other hand, it may entitle him to do acts on his own land which, were it not for the easement, would constitute a nuisance."

Id. cmt. (1944). Idaho, however, has not adopted the Restatement; moreover, in the case before the Court, the smoke created by the burning of the fields is the "nuisance or trespass" immunized by the statute, I.C. § 22- 4803A(6). This immunity thus entitles the grass farmers to invade the property of the plaintiffs' with the smoke from their burning fields, while preventing the plaintiff landowners from full possession, use, and quiet enjoyment of their land and denying them a remedy from the invasion from the farmers' smoke.

The district court followed the reasoning of the court in *Bormann, v. Board of Supervisors.* In *Bormann*, the Iowa Supreme Court recalled long-standing law that the right to maintain a nuisance is an easement, 584 N.W.2d at 315- 16,

citing Churchill v. Burlington Water Co., 94 Iowa 89, 62 N.W. 646, 647 (Iowa 1895), which holding is consistent with the Restatement of Property § 451. The court characterized the nuisance immunity provision in section 352.11(1)(a) of the Iowa Code as creating an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). *Id.* at 316. Concluding that easements are property interests subject to the just compensation requirements of the Iowa and the Federal Constitutions, the court ruled that the approval of the application for an agricultural area pursuant to 352.11(1)(a) conferred immunity, which resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. *Id.* at 321. The court concluded that the legislature had exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of compensation, compelling the court to hold "that portion of Iowa Code section 352.11(1)(a) that provides for immunity against nuisances unconstitutional and without any force and effect." *Id.* at 321-322.

There is no direct authority in Idaho holding that the right to maintain a nuisance is an easement. In a case arising out of the mooring of a houseboat on Lake Coeur d'Alene that was open, notorious, continuous, uninterrupted and with knowledge of but without permission of the littoral owners, the Court held that the houseboat owners had prescribed part of the littoral rights and acquired an easement in gross as against the littoral owners. *West v. Smith*, 95 Idaho 550, 511 P.2d 1326 (1973). In an action to enjoin the maintenance of a sign on a state highway right-of-way, the Court referred to

a California case involving an alleged obstruction or nuisance on a highway in the form of a shed erected on a right-of-way, which held: "Where the sole question is whether the maintenance of the structure or obstruction is inconsistent with the full enjoyment of the right of way by the public, the owner of the fee is deemed to possess no greater rights than those who are strangers to the title." *State ex rel. Burns v. Kelly*, 89 Idaho 139, 146, 403 P.2d 566 (1965).

The challenge in *Bormann* was one of inverse condemnation by the landowners when the Board of Supervisors failed to seek condemnation in court. 584 N.W.2d at 311-12. The landowners claimed an invasion of their property by the Board's approval of an application for an agricultural area designation, the effect of which was an immediate interference with the plaintiffs' enjoyment and use of their land and a corresponding, measurable loss of the property's value. The *Bormann* court found historical support for allowing compensation for interferences short of a physical taking or touching of the land in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) (statute that was an attempt to condemn property and deny the owner coal company the occupancy and right to mine his property viewed as a taking of an interest without any physical intrusion) and *Richards v. Washington Terminal Co.*, 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914) (recognizing the taking of a property interest or right to be free from 'special and peculiar' governmental interference with enjoyment and eliminating the requirement of a physical taking or touching). The Bormann court looked to more recent United States Supreme Court cases drawing a distinction between per se takings as outlined in *Lucas v. South Carolina Coastal Council*, 505

U.S. 1003 (1992), and all other cases involving regulatory takings, which are to be examined on a case-by-case basis, calling for a balancing test that is one of reasonableness,[2] to determine at which point the exercise of police power becomes a taking. *Bormann*, 584 N.W.2d at 316-17, *citing Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978).

The district court in deciding whether the farmers' grass burning effected a taking also relied on *Richards v. Washington Terminal Co.*, 233 U.S. 546 (1914), as cited in *Bormann*, 584 N.W.2d at 319, which awarded compensation for the gases and smoke emitted from engines in the tunnel, which constituted "special and peculiar" damage resulting in diminution of the value of the plaintiff's property. *Richards*, 233 U.S. at 557. The grass farmers correctly argue here, that the plaintiffs have not alleged any "special and peculiar" damage so as to bring themselves within the scope of a private nuisance as contemplated by *Richards*, but only such damages as naturally and unavoidably result from the field burning and are shared generally by property owners whose lands lie within the range of the inconveniences necessarily incident to proximity to the fields being burned.

We reiterate that Idaho has not recognized the right to maintain a nuisance as an easement, and we decline the plaintiffs' invitation to adopt the Restatement of Property §

2. The test focuses on three factors: (1) the economic impact of the regulation on the claimant's property; (2) the regulation's interference with investment-backed expectations; and (3) the character of the governmental action. *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 631.

451 as the law in Idaho. *See Diamond v. Farmers Group, Inc.*, 119 Idaho 146, 804 P.2d 319 (1990) ("[T]his Court has consistently displayed its preference for selectively examining various sections and comments from the Restatement, and thereafter adopting, citing favorably, or rejecting the provision, as the occasion warrants"). Further, we decline to hold that the nuisance immunity provision of I.C. § 22-4803A(6) creates an easement in favor of the grass farmers.

The grass farmers argue that the plaintiffs have failed to identify Idaho authority for the proposition that the Legislature is foreclosed from abolishing nuisance or trespass causes of action that have not yet accrued. Article XXI, § 2 *of the Idaho Constitution* provides that the legislature has the power to modify or repeal common law causes of action. It is well established that "it is the province of the Legislature, and not the court, to modify the rules of the common law." *Moon v. Bullock*, 65 Idaho 594, 607, 151 P.2d 765, 771 (1944). The Court has held that the Legislature can abolish common law causes of action entirely or impose statutes of limitation without violating Article I, § 18. *Hawley v. Green*, 117 Idaho 498, 788 P.2d 1321 (1990). More recently, the Court determined that no one has a vested right to a particular common law or necessarily, to a statutory cause of action. *Osmunson v. State*, 135 Idaho 292, 295, 17 P.3d 236, 239 (2000). The Court's comments in these two cases were directed to whether a newly enacted statute contradicted a provision of the Idaho Constitution, specifically Article I, § 18. In *Kirkland v. Blaine County Medical Ctr.*, 134 Idaho 464, 4 P.3d 1115 (2000), the Court held that I.C. § 6-1603 placing a cap on personal injury damages in personal injury

cases does not violate the right to jury trial as guaranteed by Article I, § 7 of the Idaho Constitution, does not constitute special legislation in violation of Article III, § 19 of the Idaho Constitution, and does not violate the separation of powers doctrine embodied in the Idaho Constitution.

Accordingly, we hold that that the provision of Idaho Code § 22-3806A(6) granting immunity to the grass farmers does not represent an unconstitutional taking under either the state or federal constitution.

II.

The district court ruled that HB 391 violates Article I, § 1 of the Idaho Constitution. The district court applied the test of *Newland v. Child*, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953) to analyze whether I.C. § 22- 4803A(6) promoted the common welfare and placed a reasonable limitation on the plaintiffs' inalienable right "to possess and protect property" conferred by Article I, § 1. Disagreeing with the Legislature's findings and making an independent finding that Kentucky bluegrass can be grown without burning, as is done in Oregon and Washington, the district court determined that the limitation imposed by the statute was not "in the interests of the common welfare."

The plaintiffs' challenge to the statute is a facial challenge, invoking a standard requiring the challenger to establish that no set of circumstances exist under which the Act would be valid. *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982); *State v.*

Newman, 108 Idaho 5, 12, 696 P.2d 856, 863 (1985), *citing Steffel v. Thompson*, 415 U.S. 452 (1974). Because there clearly are some interests of the common welfare being protected by the Legislature's action in allowing field burning, we cannot say that the plaintiffs have met their burden to show no conceivable constitutional application for this legislation. There were no facts presented at this stage of the case, and accordingly, an "as applied" challenge is not available to the plaintiffs.

Nor were there facts presented challenging either the sufficiency or the motivation behind the Legislature's findings. "The existence of facts supporting the legislative judgment is to be presumed." *United States v. Carolene Products Co.*, 304 U.S. 144, 152 (1938). The legislature's judgment is "well-nigh conclusive." *Berman v. Parker*, 348 U.S. 26, 32 (1954); *see also Sweet v. Rechel*, 159 U.S. 380, 392 (1895); *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388, *(1926)* ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."). Plaintiffs challenging the constitutionality of a statute are required to provide "some factual foundation of record" that contravenes the legislative findings. *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 258 (1931). In the absence of such proof, "the presumption of constitutionality must prevail." *Id. at 257.*

The district court erred in holding I.C. § 22-4803A(6) unconstitutional because it violated Article I, § 1 of the Idaho Constitution.

Appendix A

III.

The district court ruled HB 391 unconstitutional in that it constitutes a local orspecial law in violation of Article III, § 19 of the Idaho Constitution, which provides that "[t]he legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: ... For limitation of civil or criminal actions."

A law "is not special when it treats all persons in similar situations alike." *Sun Valley Co. v. City of Sun Valley*, 109 Idaho 424, 429, 708 P.2d 147, 152 (1985); *Twin Falls Clinic and Hospital Bldg. v. Hamill*, 103 Idaho 19, 26, 644 P.2d 341, 348 (1982). Nor is a law local "when it applies equally to all areas of the state." *Sun Valley Co.*, 109 Idaho at 429, 708 P.2d 147; *School Dist. No. 25 v. State Tax Comm'n*, 101 Idaho 283, 291, 612 P.2d 126, 134 (1980). "A law is not special simply because it may have only a local application or apply only to a special class, if in fact it does apply to all such classes and all similar localities and to all belonging to the specified class to which the law is made applicable." *Bd. of County Comm'rs of Lemhi County v. Swensen*, 80 Idaho 198, 201, 327 P.2d 361, 362 (1958), *citing Mix v. Bd. of Comm'rs*, 18 Idaho 695, 705, 112 P. 215 (1910).

The standard for determining whether a law is local or special was most recently set forth in *Concerned Taxpayers of Kootenai County v. Kootenai* County, 137 Idaho 496, 499, 50 P.3d 991, 994 (2002). The Court stated therein, "The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable." *Id.* at 499, 50 P.3d at 994. This enunciation of the test was

derived from *Sun Valley Co.*, 109 Idaho at 429, *citing Washington County v. Paradis*, 38 Idaho 364, 369, 222 P. 775, 777 (1923). A close reading of Paradis, however, indicates the source of the test as *Jones v. Power County*, 27 Idaho 656, 150 P. 35 (1915), where the Court said in discussing general and special laws:

> A statute is general if its terms apply to, and its provisions operate upon, all persons and subject matters in like situation. (See DILLON ON MUNICIPAL CORPORATIONS, 5th ed., sec. 142.) The true test seems to be: Is the classification capricious, unreasonable or arbitrary?

Id. at 665, 150 P. at 37. Local and special laws are defined separately and apply to different situations. The *Jones* case applies the "capricious, unreasonable arbitrary" test to special laws not local laws. To the extent *Sun Valley Co. v. City of Sun Valley*, is said to apply to local laws, it is disavowed.

The district court in its memorandum decision rephrased the test for analyzing whether a law is local or special, when it stated: "The test for determining whether a law is local or special is basically whether the legislature has singled out 'persons or corporations for preferred treatment.' " *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho at 499, 50 P.3d at 994, *citing Jones v. Bd. of Medicine*, 97 Idaho 859, 877, 555 P.2d 399, 417 (1976). This test also incorrectly links the local and special laws under the same test. In *Jones*, the court specifically held:

Appendix A

> It has been indicated that the distinction between general and special legislation is that a law is general if "all persons subject to it are treated alike as to privileges, protection and in every other respect." *Wanke v. Ziebarth Const. Co.*, 69 Idaho 64, 202 P.2d 384, 393 (1948). Stated in other terms, "A statute is general if its terms apply to, and its provisions operate upon, all persons and subject-matter in like situation[s]." *Jones v. Power County*, 27 Idaho 656, 150 P. 35, 37 (1915); *In re Bottjer*, 45 Idaho 168, 260 P. 1095 (1927). "It is well settled that a law is not special in character 'if all persons subject to it are treated alike, under similar circumstances and conditions, in respect to both the privileges conferred and the liabilities imposed.'" *State v. Horn*, 27 Idaho 782, 793, 152 P. 275, 279 (1915). [Citations omitted.]
>
> Clearly, it is arguable at least that the Act in question here [(the recovery limitation in the Idaho Malpractice Act)] is special in that it selects from a class of persons otherwise subject to liability for their negligent acts, physicians and hospitals, and releases or extinguishes, in part at least, their otherwise liability contrary to the interdiction of special laws in Art. III, § 19.

Jones v. Bd. of Medicine, 97 Idaho at 876-77, 555 P.2d at 416-17. Applying the test as rephrased, the district court concluded that there was "simply no proof that the legislature has singled out 'persons or corporations for preferred treatment.'"

The district court then examined the text of I.C. § 22-4803A(6), which is the sole provision challenged as a local or special law by the plaintiffs. The district court first concluded that nothing in the immunity provision, I.C. § 22-4803A(6), pertains only to the ten north Idaho counties. However, the district court reasoned that "via I.C. §§ 22-4803 and 22-4803A(3)," the immunity statute is specific to the ten northern counties. The district court then found that the immunity statute does not apply "equally to all areas of the state" and is arbitrary, capricious and unreasonable, supporting its conclusion that I.C. § 22-4803A(6) is a special or local law. We will discuss each of the district court's findings in turn.

The immunity provision provides: "Crop residue burning conducted in accordance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute a trespass." According to I.C. § 22-4803, entitled Agricultural Field Burning, open field burning of crop residue is allowed when the burning is done in compliance with the provisions and rules promulgated in the chapter and when no other economically viable alternatives to burning are available. See I.C. § 22-4803(1). Under subsection (2), the following provisions shall apply to *all* agricultural field burning:

> (a) In order to minimize impacts upon populated areas of the counties designated in subsection (3) of this section, any person conducting crop residue burning must make every reasonable effort to burn only when weather conditions are conducive to adequate smoke dispersion, and the burning does not emit particulates or other materials which

> exceed the state and federal ambient air quality standards; and
>
> (b) The open burning of crop residue shall be conducted in the field where it is generated.

I.C. § 22-4803(2)(a), (b). These provisions apply to all agricultural field burning statewide. Subsection (3) imposes additional requirements upon the ten northern counties to register each field with the department each year burning is conducted and to obtain authorization from the department that the conditions of subsection (2)(a) are met before burning.

I.C. § 22-4803A defines violations of the registration and preauthorization requirements pursuant to subsection (3) of I.C. § 22-4803. Thus, there are no ramifications other than to field burners in the ten counties. Section 4803A also outlines procedures for imposing penalties for such violations, for inspections and investigations of possible violations, and sets forth the limitation of actions applicable to proceedings to recover for violations of any provision of the chapter. Subsection (5) of I.C. § 22-4803A specifically provides "the department shall investigate all agricultural field burning and crop residue disposal complaints lodged against persons conducting burning in Kootenai, Benewah, Boundary, Bonner, Shoshone, Latah, Clearwater, Nez Perce, Lewis and Idaho counties." It is clear that pursuant to subsection (5), the statute mandates heightened scrutiny in the ten named counties, to ensure compliance with the general conditions that must be satisfied in anticipation of burning.

Lastly, we consider the second sentence of subsection (6), *which follows the immunity provision:*

> Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to section 22-4803(3), Idaho Code, provided such activities area conducted in accordance with the chapter 484, title 22, Idaho Code, and rules promulgated thereunder.

We read this portion of the statute to mean that if any person fails to comply with the provisions of the chapter when burning, there is no negligence per se on account of a violation of the statute. The holding of this Court is that subsection (6) of the statute applies equally to all crop residue burners and not only to the ten northern counties; therefore, I.C. § 22- 4803A(6) is not a local law.

The district court concluded that the statute was arbitrary, capricious and unreasonable, based principally on its independent finding that there is no need to burn. Generally, plaintiffs challenging the constitutionality of a law are required to provide "some factual foundation of record" that contravenes the legislative findings. *O'Gorman & Young v. Hartford Fire Ins. Co.*, 282 U.S. 251, 258 (1931). In the absence of such proof, "the presumption of constitutionality must prevail." *Id.* at 257. *See also United States v. Carolene Products Co.*, 304 U.S. 144 (1938) ("The existence of facts supporting the legislative judgment is to be presumed."); *Jones v. Power County*, 27 Idaho 656, 666, 150 P. 35, 37

(1915) ("We are not aware of any rule whereby an act of the legislature must specify the conditions on which its validity must depend, but, on the contrary, the court will assume the existence of such conditions until it is apparent that they do not exist."). Despite some particularized references to the ten northern counties, including the imposition of stricter requirements on North Idaho counties, the statute applies to all counties. We reverse the district court's conclusion that the statute is a local and a special law.

CONCLUSION

The immunity provision found at I.C. § 22-4803A(6) does not effect a taking in violation of the Fifth Amendment of the United States Constitution or Article I, § 14 of the Idaho Constitution. It does not violate Article I, § 1 of the Idaho Constitution or the prohibition against local or special laws found in Article III, § 19 of the Idaho Constitution. The statute is constitutional.

Chief Justice TROUT and Justices SCHROEDER and McKEE, Senior Judge, **CONCUR.**

Justice KIDWELL, **DISSENTING.**

The majority opinion has misinterpreted and misapplied the Idaho Constitution in its analysis of *I.C. § 22-4803A(6)*; therefore, I respectfully dissent and set forth a portion of my analysis as follows:

I.C. 22-4803A(6) (a portion of HB 391) Violates Article III, Section 19 Of The Idaho Constitution

Appendix A

The Idaho Constitution prohibits certain "local" or "special laws." Article III, section 19 states: "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say ... For limitation of civil or criminal actions." Plaintiffs' argument that HB 391 is a special or local law addresses I.C. § 22-4803A(6). The district court correctly found that HB 391 limits "civil actions" in ten north Idaho counties via § 22-4803A(6), which states:

> Crop residue burning conducted in accordance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute a trespass. Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to section 22-4803(3), Idaho Code, provided such activities are conducted in accordance with chapter 49, title 22, Idaho Code, and rules promulgated thereunder.

A. I.C. 22-4803A(6) Does Not Apply Equally To All Areas Of The State And Is Therefore Unconstitutional

The controlling law in Idaho concerning local and special laws can be found in a recent unanimous decision of the Idaho Supreme Court, *Concerned Taxpayers of Kootenai County v. Kootenai County*, 137 Idaho 496, 50 P.3d 991 (2002). As the majority indicates, the district court rephrased the law of *Concerned Taxpayers* at one point ("the test for determining whether a law is local or special is basically whether the legislature has singled out 'persons or corporations for

preferred treatment'"); however, the majority fails to recognize that the district court used the correct law of *Concerned Taxpayers* in its analysis and applied it correctly.

In *Concerned Taxpayers*, the Court held, "A law 'is not special when it treats all persons in similar situations alike,' and it is not local 'when it applies equally to all areas of the state.'" 137 Idaho 496, 500, 50 P.3d 991, 994 (2002). The district court made reference to this language when it cited to *Sun Valley Co. v. City of Sun Valley* for the proposition that, "Accordingly, I.C. § 22-4803A(6) is a special or local law because it does not apply 'equally to all areas of the state.'" 109 Idaho 424, 429, 708 P.2d 147 (1985).

The district court found that HB 391 does not apply equally to all areas of the state. Though nothing in the language of I.C. § 22-4803A(6) pertains only to specified counties, it references two sections that are limited to ten north Idaho counties. The district court stated that § 22-4803A(6) references § 22-4803 and § 22-4803A(3), (this is likely a clerical error of the district court—the section references § 22-4803 and § 22-4803(3), not § 22-4803A(3)). Both sections 22-4803 and 22-4803(3) are limited to ten north Idaho counties. The district court concluded that § 22-4803A(6) is a special or local law because it does not apply "equally to all areas of the state" via the two sections referenced. The district court is correct in its conclusion, though it may be helpful to look at each sentence of § 22-4803A(6) in more detail.

Appendix A

1. The First Sentence of § 22-4803A(6)

The first sentence reads: "Crop residue burning conducted in accordance with section 22-4803, Idaho Code, shall not constitute a private or public nuisance or constitute a trespass."

Since § 22-4803 is referenced, it is helpful to look at it more closely. The majority correctly identifies that the provisions of subsection (2) apply to **all** agricultural field burning. Provision (2)(a) refers to the ten counties when it states, "In order to minimize impacts upon populated areas of the counties designated in subsection (3) of this section, any person ..." It appears from this alone that *§ 22-4803* refers to the counties listed under subsection (3) only to show that these counties are intended to be protected. However, further reading shows that subsection (3) does not apply equally to all agricultural field burning because it imposes additional requirements upon ten counties to register and obtain authorization from the department before burning. The majority acknowledges the heightened scrutiny, but it fails to explain how the heightened scrutiny does not effect equal application of the statute. It seems clear that the additional requirements set forth in subsection (3) demonstrate that the statute does not apply equally to all areas of the state.

2. The Second Sentence of § 22-4803A(6)

The second sentence reads:

> *Nothing in this chapter shall be construed to create a private cause of action against any*

> *person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to section 22-4803(3)*, Idaho Code, provided such activities are conducted in accordance with chapter 49, title 22, Idaho Code, and rules promulgated thereunder.

(Emphasis added.) The majority incorrectly interprets this to mean the section applies to all crop burners in the state, again, without much explanation. The second sentence specifically refers to § 22-4803(3), which states, "[I]n the counties specifically identified in this subsection, no person shall conduct or allow any crop residue burning without first registering each field with the department each year before burning is conducted, and without first receiving authorization from the department ..." Since everyone that engages in crop burning in these ten counties must first register and obtain authorization, the second sentence appears to say, "Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning in Kootenai, Benewah, Boundary, Bonner, Shoshone, Latah, Clearwater, Nez Perce, Lewis and Idaho counties." This clearly shows that the statute does not apply equally to all counties that conduct field burning statewide.

B. A Law Is Local Or Special If It Is Arbitrary, Capricious Or Unreasonable

Concerned Taxpayers also noted, "The test for determining whether a law is local or special is whether the classification is arbitrary, capricious, or unreasonable." 137

Idaho 496, 500, 50 P.3d 991, 994 (2002). The district court applied this rule, citing *Kirkland v. Blaine County Medical Center*, 134 Idaho 464, 4 P.3d 1115 (2000). The legislature stated the intent of HB 391 in I.C. § 22-4801, which reads:

> It is the intent of the legislature to promote agricultural activities while at the same time protecting public health. The legislature finds that due to the climate, soils and crop rotations unique to north Idaho Counties, crop residue burning is a prevalent agricultural practice and that there is an environmental *benefit to protecting water quality from the growing of certain crops* in environmentally sensitive areas. It is the intent of the legislature to reduce the loss to the state of its agricultural resources by providing a safe harbor to farmers when burning crop residues in compliance with this chapter and limiting the circumstances under which agricultural operations may be exposed to claims outside of the lawful framework for crop residue burning.

(Emphasis added.) The district court correctly observed, "[T]he statute does not say that 'burning protects water quality.' Instead, the statute in essence says 'the crop which the legislature is protecting protects water quality.'" This implies that if farmers are not allowed to burn, they will not grow this crop for which there is an environmental benefit. The district court stated that this belief is based on the fallacy that one must burn in order to grow these crops. The district court points out that Washington, Oregon, and free markets have proven that these crops can be grown without burning.

It concluded that the purpose of the statute as written by the legislature is arbitrary, capricious and unreasonable since it is based on a fallacy.

The majority states that the district court's conclusion is based on "an independent finding that 'there is no need to burn' " and further states that the plaintiffs must provide "some factual foundation of record" that contravenes the legislative findings. For support of this contention, the majority cites *O'Gorman & Young v. Hartford Fire*, 282 U.S. 251, 258, 51 S.Ct. 130, 132 (1931). However, that case did not analyze whether a statute was special or local. Again, the controlling case in Idaho regarding local and special laws is *Concerned Taxpayers*. In *Concerned Taxpayers* the Idaho Supreme Court was not persuaded by the defendant's justifications for the statute, and went on to state, "Regardless of the rationalizations and social policy arguments offered by [the defendant], one cannot escape the fact that [the statute in question] is directly contrary to the prohibitions contained in Article III, § 19 of the Idaho Constitution." 137 Idaho 496, 499, 50 P.3d 991, 996.

The district court's conclusion that the rationalizations given for the statute are unpersuasive and that § 22-4803A(6) is a special or local law, and therefore unconstitutional, is correct and should have been upheld. This analysis precludes the necessity of addressing additional constitutional issues raised.

APPENDIX B — MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION TO DECLARE HB 391 UNCONSTITUTIONAL OF THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI DATED AND FILED JUNE 4, 2003

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

Case No. **CV 2002 3890**

LAWRENCE ("BUD") MOON, JR., et al.,

Plaintiffs,

vs.

NORTH IDAHO FARMERS ASSOCIATION, et al.,

Defendants.

MEMORANDUM DECISION AND ORDER GRANTING PLAINTIFFS' MOTION TO DECLARE HB 391 UNCONSTITUTIONAL

I. BACKGROUND.

Plaintiffs filed their "Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any of the Rights of Plaintiffs and Members of the Class" on April 30, 2003. The stated purpose of plaintiffs' motion is

Appendix B

"to move for an order declaring HB 391 unconstitutional on the following grounds: (1) HB 391 takes plaintiffs and class members' property without prior compensation in violation of the state and federal constitution; (2) HB 391 is unconstitutional because the state cannot authorize the right to injure plaintiffs and the class in their own homes; (3) HB 391 violates due process because it fails to provide procedures for compensation; (4) HB 391 constitutes illegal special legislation in violation of *Article III, Section 19 of the Idaho Constitution*; and (5) HB 391 violates plaintiffs' and class members' fundamental rights." Motion to Declare HB 391 Unconstitutional, p. 2. The motion was supported by "Plaintiffs' Memorandum in Support of Motion Regarding the Constitutionality of HB 391" and the "Affidavit of R. Brent Walton Regarding the Constitutionality of HB 391," all filed on the same date. On May 7, 2003 the State of Idaho Attorney General, as the State's chief legal officer filed its "Brief *Amicus Curiae* of Idaho Attorney General In Support of House Bill 391's Constitutionality" along with a Motion to Appear as *Amicus Curiae* by Idaho Attorney General in Support of House Bill 391's Constitutionality. The Motion to Appear as *Amicus Curiae* was granted by the Court in its May 19, 2003 Order Granting Leave to Appear as *Amicus Curiae*. Also filed on May 7, 2003 were Defendants Lampert Farm & Ranch et al.'s "Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional"; defendants Meyer et al. filed a "Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional Submitted by Defendants Wayne Meyer et al."; defendants McLean et al. filed: "McLean, et al.'s Memorandum in Opposition to Motion to Declare HB 391 Unconstitutional"; and defendants North Idaho Farmers Association filed

Appendix B

"Defendant North Idaho Farmers Association's Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional." On May 14, 2003, plaintiffs filed "Plaintiffs' Combined Reply Re: Constitutionality of HB 391" and "Affidavit of R. Brent Walton in Support of Plaintiffs' Combined Reply Re: Constitutionality of HB 391." Oral argument on the motion was held May 22, 2003. The Court has read each of these briefs on more than one occasion, has reviewed the text of the decisions cited in those briefs, and has reviewed a transcript of the May 22, 2003 hearing in reaching its decision.

II. THE STATUTE AT ISSUE AND CONSTITUTIONAL ANALYSIS OF STATUTES.

A. HOUSE BILL 391 AND IDAHO CODE § 28-4803A(6).

Idaho Code §§ 22-4801 through 4804 allow agricultural field burning when farmers comply with those statutes and any rules promulgated under those statues. Those statutes have been in effect since 1999.

On April 23, 2003, HB 391 was signed into law by Idaho's Governor. Section 5 of that bill contains an emergency clause, causing the statute to take effect on its passage and approval, rather than on the ordinary effective date of July 1 following the legislative session. House Bill 391 amended portions of *Idaho Code § 22-4803*, and added a new statute, *Idaho Code § 22-4803A*. While not specifically stated in plaintiff's "Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any

of the Rights of Plaintiffs and Members of the Class," the Court understands that the pertinent portion of HB 391 which plaintiffs argue is unconstitutional, is that portion which created *Idaho Code § 22-4803A(6)*. This is because plaintiffs argue: "HB 391 purports to give this small group of farmers the right to do what no others in our society can-irreparably injure others with absolute immunity." Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any of the Rights of Plaintiffs and Members of the Class, p. 1.

Idaho Code § 22-4803A(6) reads as follows"

> (6) Crop residue burning conducted in accordance with *section 22-4803 Idaho Code*, shall not constitute a private or public nuisance or constitute trespass. Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to *section 22-4803(3) Idaho Code*, provided such activities are conducted in accordance with chapter 49, title 22, Idaho Code, and rules promulgated thereunder.

B. CONSTITUTIONAL INTERPRETATION.

The constitutionality of a statute is a question of law. *State v. Cobb, 132 Idaho 195, 197, 969 P.2d 244, 246 (1998)*. The party challenging a statute's constitutionality bears the burden of establishing that the statute is unconstitutional and "must overcome a strong presumption of validity." *Olsen v.*

J.A. Freeman Co., 117 Idaho 706, 709, 791 P.2d 1285, 1288 (1990). Courts are obligated to seek an interpretation that will save the statute from constitutional infirmity. *State v. Richards, 127 Idaho 31, 34, 896 P.2d 357, 360 (Ct.App.1995).* These cases were noted by defendants Lampert Farm & Ranch et al., Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional, p. 4. As noted by this Court in its Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, p. 11: "The Idaho Supreme Court has held: 'The cardinal principle of statutory construction is to save and not destroy.' *Keenan v. Price, 68 Idaho 423, 195 P.2d 662 (1948).*" "An act of the legislature is presumed to be constitutional, but whether the act is reasonable or arbitrary or discriminatory is a question of law for determination by this Court." *Coghlan v. Beta Theta Pi Fraternity, 133 Idaho 388, 395, 987 P.2d 300, 307 (1999).*

III. CONSTITUTIONAL ANALYSIS OF *IDAHO CODE § 22-4803A(6).*

Plaintiffs assert that *Idaho Code § 22-4803A(6)* is unconstitutional as it: (a) takes plaintiffs and class members' property without prior compensation in violation of the state of Idaho and federal constitutions; (b) violates due process because it fails to provide procedures for compensation; (c) constitutes illegal special legislation in violation of *Article III, Section 19 of the Idaho Constitution*; (d) HB 391 violates plaintiffs' and class members' fundamental rights and (e) HB 391 cannot apply retroactively. Plaintiffs' Memorandum in Support of Motion Re: Constitutionality of HB 391, pp. 4-5, 11-27.

Appendix B

This Court finds Idaho Code § 22-4802A(6) to be unconstitutional for the following reasons: (1) it takes property without prior compensation or due process in violation of the Fifth and Fourteenth Amendment to the United States Constitution and Article 1, Section 13 and Section 14 of the Idaho Constitution; (2) it violates *Article 1, Section 1 of the Idaho Constitution* because the "limitation" imposed by the statute is not in the "interests of the common welfare" and (3) because it is a "local or special law" in violation of *Article III, section 19 of the Idaho Constitution.*

A. TAKING WITHOUT PRIOR COMPENSATION OR DUE PROCESS.

The Fifth Amendment to the Federal Constitution provides that "no person shall be ... deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." The Fourteenth Amendment to the Federal Constitution prohibits a state from "depriving any person of life, liberty, or property without due process of law." The Fourteenth Amendment makes the Fifth Amendment applicable to the states and their political subdivisions. *Chicago B. & Q.R. Co. v. City of Chicago, 166 U.S. 226, 234-35 (1897).*

Article I, section 13 of the Idaho Constitution also proclaims that no person shall "be deprived of life, liberty or property without due process of law." The very next section of Idaho's Constitution provides:

> SECTION 14. RIGHT OF EMINENT DOMAIN. The necessary use of lands for the construction of reservoirs or storage basins, for the purpose of

> irrigation, or for rights of way for the construction of canals, ditches, flumes or pipes, to convey water to the place of use for any useful, beneficial or necessary purpose, or for drainage; or for the drainage of mines, or the working thereof, by means of roads, railroads, tramways, cuts, tunnels, shafts, hoisting works, dumps, or other necessary means to their complete development, or any other use necessary to the complete development of the material resources of the state, or the preservation of the health of its inhabitants, is hereby declared to be a public use, and subject to the regulation and control of the state.
>
> Private property may be taken for public use, *but not until a just compensation*, to be ascertained in the manner prescribed by law, *shall be paid therefor.*

(emphasis added). Due process under the Idaho Constitution requires compensation first, before private property may be taken. The Idaho Supreme Court held:

> It being thus firmly established and announced by the Constitution that the owner of property is entitled to compensation before it can be taken, to force him for relief to file a suit for recommendatory judgment, Art. 5, Sec. 10, before the Supreme Court, almost denies relief because such procedure is uncertain, problematical, dilatory, and based purely on sufferance and not on right.

Appendix B

Renninger v. State, 70 Idaho 170, 177, 213 P.2d 911 (1950). *Idaho Code §§ 7-706* to *7-710* establishes the procedure that the Constitution and law requires.

> It will thus be seen that under the provisions of the constitution private property may be taken for public use, *but not until just compensation, ascertained in a manner prescribed by law*, shall be paid therefor. This provision of the constitution limits the power of the legislature in providing the proceedings for the taking of private property for public use, in that before such property can be so taken a just compensation must be first ascertained and the payment therefor made.

Big Lost River Irrigation Co. v. Davidson, 21 Idaho 160, 168, 121 P. 88 (1912) (emphasis added).

Plaintiffs claim HB 391 fails to include any procedure for providing compensation, and thus is a taking which violates due process in contravention of the United States and Idaho Constitutions. The remedy claimed by plaintiffs is that HB 391 be declared void.

One argument of defendants is that the legislature may authorize public nuisances. While the legislature may authorize public nuisances, it lacks the authority to immunize people and corporations from private nuisance or trespass claims where the conduct allegedly authorized is so unreasonable and causes such serious harm as to destroy fundamental property rights to occupy, use and enjoy one's home in security and comfort, because to do so violates the Federal and State Constitutions.

Appendix B

Another argument of defendants is that the legislature may take away causes of action. Clearly the legislature can do this, but it cannot violate the Federal and State Consitutions in doing so.

This Court is being asked to determine if the immunity provision in *Idaho Code § 22-4803A(6)* results in a taking without prior compensation. Again, that statute reads:

> (6) Crop residue burning conducted in accordance with *section 22-4803 Idaho Code*, shall not constitute a private or public nuisance or constitute trespass. Nothing in this chapter shall be construed to create a private cause of action against any person who engages in or allows crop residue burning of a field or fields required to be registered pursuant to *section 22-4803(3) Idaho Code*, provided such activities are conducted in accordance with chapter 49, title 22, Idaho Code, and rules promulgated thereunder.

This Court finds such statute results in a taking without prior compensation. Accordingly, the statute cannot survive a constitutional analysis, and therefore, it is unconstitutional.

The reason this amounts to a taking is as follows. By abolishing nuisance and trespass claims, the Idaho legislature placed these plaintiffs and class members in a situation where they are now powerless to enjoin the injury and damage suffered by grass field burning.[1] By doing so, the Idaho

1. Idaho Code § 22-4308A(6) only immunizes defendants for burning when done in compliance with the regulations, however, plaintiffs have put on proof that even when fields are burned in compliance with the regulations, injury occurs.

legislature imposed a servitude on plaintiffs' property. "Property is taken in the constitutional sense when inroads are made upon an owner's use of it to an extent that, as between private parties, a servitude has been acquired." *United States v. Dickinson, 331 U.S. 745, 748 (1947).*

Simply stated, defendants' field burning impacts plaintiffs' right to exclusive possession of their property, and the immunity provision in Idaho Code § 22-4308A(6) causes plaintiffs to lose their remedies of either injunctive relief or damages under trespass or nuisance. That result is a taking of their property without compensation. The smoke is still present, the effects on their health are still present, the nuisance and trespass are still present, but as of April 23, 2003, plaintiffs lost their remedy due to Idaho Code § 22-4308A(6). That is a taking without compensation.

Stated another way, the right to maintain a nuisance is an easement. Restatement (Third) Property § 1.2(1) (2000); *Restatement of Property § 451, at 2912 (1944).* Defendants right to burn and create smoke which goes upon plaintiffs' land is a nuisance, and a right to maintain a nuisance is an easement,[2] and defendants cannot have that easement without paying for it. The immunity provision of Idaho Code § 22-4308A(6) precludes defendants from ever paying for that

2. As plaintiffs noted in the present case, smoke traversing over and into plaintiffs' homes, or otherwise forcing them to abandon their homes, is an easement because it privileges the owner of one tenement with a right to use the tenement of plaintiffs; it is "a right which one person has to use the land of another for a specific purpose, or a servitude imposed as a burden upon land." *Sinnett v.. Werelus*, 83 Idaho 514, 520, 365 P.2d 952, 955 (1961). Plaintiffs' Combined Reply Re: Constitutionality, p. 11, n. 8.

easement, thus, defendants have taken plaintiffs' property without just compensation.

In Idaho, "[t]he home is a favorite of the law. It is there that the citizen can claim the right of privacy, the right to be let alone, on clear grounds." *Rowe v. Pocatello, 70 Idaho 343, 352, 218 P.2d 695, 701 (1950).* "[T]he very constitutional guarantees of life, liberty, property and equal protection ... are the same provisions which guarantee the right of the householder to the quiet, peaceful, and undisturbed enjoyment of the privacy of his home." *Id.* And, when a citizen seeks to protect his or her rights of safety, privacy, and security in the home, "the ordinary remedies by civil suit are available." *Id.* Thus, any law that deprives people of their ability to protect these rights through the courts or remedy the invasion of these rights is unconstitutional. As the Idaho Supreme Court has stated:

> Under the provisions of the constitution, private property cannot be taken for public use or for corporations without just compensation being first made to the owner, except by consent. The courts—and it was never intended to be otherwise understood—are not "masons" to "chisel" away vested rights of property or private individuals, however humble or obscure the owner, for the benefit of the public or great corporations. It is the pride of this republic that no man can be deprived of his property without due process of law, and the poorest citizen can find redress for an unlawful injury caused by his wealthy neighbor by appealing to the courts of his county.

Hill v. Standard Mining Co., 12 Idaho 223, 239, 85 P. 907, 911-12 (1906).

Appendix B

The right to exclusive use of one's land (the right to exclude others from that land), is a fundamental element attributable to ownership of property, and the Government cannot take such without compensation. *Kaiser Aetna Et al. v. United States, 444 U.S. 164, 179-80, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979).* Idaho recognizes that easements are property rights, as is every legal interest in the estates and rights of land. *Hughes v. State, 80 Idaho 286, 293, 328 P.2d 397 (1958).* Fundamental to any concept of property are mainly three powers: possession, use, and disposition. *United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945).* In Idaho, "Any destruction, interruption, or deprivation by the common, usual, and ordinary use of property is by the weight of authority a 'taking' of one's property in violation of the constitutional guaranty." *Hughes v. State, 80 Idaho 286, 294, 328 P.2d 397 (1958); citing Knowles v. New Sweden Irr. Dist., 16 Idaho 217, 231, 101 P. 81, 86 (1908).* (emphasis added). Plaintiffs have proven through their medical evidence, that they cannot reside in their land during field burning without suffering injury. The emphasized words of *Hughes* show that even though field burning takes place in two months of the year, August and September, the burning invades and destroys two of the three fundamental aspects of their property rights ... possession and use.

Renninger v. State, 70 Idaho 170, 213 P.2d 911 (1950), is an Idaho Supreme Court decision which holds that just compensation is warranted even when the taking is *intermittent. 70 Idaho at 176, 213 P.2d at 915,* citing *United States v. Lynah, 188 U.S. 445, 23 S.Ct. 349, 47 L.Ed. 539 (1903).* In *Renninger* the taking was intermittent because of the seasonal overflow of a river. In the present case it is

intermittent because burning only occurs two months out of the year. The Idaho Supreme Court in *Renninger* held: "... where real estate is actually invaded by superinduced additions of water, earth, sand or other material ... so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the Constitution, and that this proposition is not in conflict with the weight of judicial authority in this country, and certainly no with sound principle." *70 Idaho at 174, 213 P.2d at 913.* (emphasis added). The Idaho Supreme Court held that under *Article 1, Section 14 of the Idaho Constitution* it "... is mandatory that private property may not be taken until a just compensation, to be ascertained in the manner prescribed by law, is paid." *70 Idaho at 177, 213 P.2d at 915.* The *Idaho Supreme Court in Renninger (70 Idaho at 174)* cited *Eaton v. B.C. & M.R. R, 51 N.H. 504 (N.H.1872)* with approval. The Supreme Court of New Hampshire in *Eaton* held that the railroad was liable because "it was beyond the power of the legislature to authorize the infliction of this injury on the plaintiff, without making provision for his compensation." *51 N.H. at 515.* As in this present case, the defendants in *Eaton* were causing injury to the plaintiff by performing some act on their land which "restrict[ed] or burden [ed] the plaintiff's ownership of his land." *Id.* Thus, according to the *Eaton* court, if the defendants' claim that they were not liable because of a legislative authorization was "well founded," then "an easement is already vested in them." *Id.* Then, the New Hampshire Supreme Court stated:

> An easement is property, and is within the protection of the constitutional prohibition now under consideration. If the defendants have

> acquired this easement, it cannot be taken from them, even for the public use, without compensation. But the right acquired by the defendants is subtracted from the plaintiff's ownership of the land. Whatever interest the defendants have acquired in this respect the plaintiff has lost. If what they have gained is property, then what he has lost is property. If the easement, when once acquired, cannot be taken from the defendants without compensation, can the defendants take it from the plaintiff in the first instance without compensation?

Id. (citations omitted). The New Hampshire Supreme Court held defendants could not take an easement without compensation.

One case is very much factually on point. *Bormann et al. v. Board of Supervisors in and for Kossuth County, Iowa, et al., (Bormann), 584 N.W.2d 309 (Iowa 1998)*, is a unanimous decision[3] of the Iowa Supreme Court. That opinion has not been overruled or interpreted negatively by any other appellate court since it was written five years ago. The United States Supreme Court denied certiorari in February, 1999. *Girres v. Bormann, 525 U.S. 1172, 119 S.Ct. 1096, 143 L.Ed.2d 96.* In *Bormann*, Gerald and Joan Girres applied to the Kossuth County Board of Supervisors for establishment of an "agricultural area" for their 960 acres. *584 N.W.2d at 312.* Under *Iowa Code section 352.11(1)(a)*, approval of an "agricultural area" gave the applicants

3. All Iowa Supreme Court Justices concurred except Justices Larson and Adreasen who did not take part. 584 N.W.2d 309, 322.

immunity from nuisance suits. *Iowa Code § 352.11(1)(a)* read in part: "A farm or farm operation located in an agricultural area shall not be found to be a nuisance regardless of the established date of operation or expansion of the agricultural activities of the farm or farm operation." *584 N.W.2d at 314*. The Bormanns and others challenged the County Board of Supervisor's decision approving the designation of an agricultural area. *584 N.W.2d at 312-13*. That *Bormann* opinion begins as follows:

> In this appeal we are asked to decide whether a statutory immunity from nuisance suits results in a taking of private property for public use without just compensation in violation of federal and Iowa constitutional provisions. We think it does.

584 N.W.2d at 311. That opinion ends as follows:

> Accordingly, we hold unconstitutional and invalidate that portion of *section 352.11(1)(a)* that provides for immunity against nuisance suits. We reach this result under the Fifth Amendment to the Federal Constitution and also under *article I, section 18 of the Iowa Constitution*.
>
> We reverse and remand for an order declaring that portion of *Iowa Code section 352.11(1)(a)* that provides for immunity against nuisances unconstitutional and without any force or effect.

Appendix B

We reach this holding with a full recognition of the deference we owe to the General Assembly. That branch of government—with some participation by the executive branch—holds the responsibility to sort through the practical realities and, through the political process, reach consensus in highly controversial public decisions. Those decisions demand our sincere respect. The rule is therefore that "[a] challenger must show beyond a reasonable doubt that the statute violates the constitution and must negate every reasonable basis that might support the statute." *Johnston v. Veterans' Plaza Authority, 535 N.W.2d 131, 132 (Iowa 1995).* The rule finding constitutionality in close cases cannot control the present one, however, because, with all respect, *this is not a close case.* When all the varnish is removed, the challenged statutory scheme amounts to a commandeering of valuable property rights without compensating the owners, and sacrificing those rights for the economic advantage of a few. In short, it appropriates valuable private property interests and awards them to strangers. The same public that constituted the other branches of state government to make political decisions with an eye on economic consequences expects the court to resolve constitutional challenges on a purely legal basis. We recognize that political and economic fallout from our holding will be substantial. But we are convinced our responsibility is clear because the challenged scheme is *plainly-we think flagrantly-unconstitutional.*

584 N.W.2d 309, 321-22. (emphasis added).

Appendix B

One hundred and twenty years ago, the United States Supreme Court decided *Baltimore & Potomac Railroad Co. v. Fifth Baptist Church, 108 U.S. 317; 2 S.Ct. 719; 27 L.Ed. 739 (1883)*. That case involved a lawsuit to recover damages for discomfort occasioned by establishment of a building for housing railroad locomotives next to a church. The first words of that decision read:

> If the facts are established which the evidence tended to prove, and from the verdict of the jury we must so infer, there can be no doubt of the right of the plaintiff to recover. The engine house and repair shop of the railroad company, as they were used, rendered it impossible for the plaintiff to occupy its building with any comfort as a place of public worship.

108 U.S. at 328-29; 2 S.Ct. at 726. (emphasis added). The emphasized language indicates that it, too, was not a close call. In that case, the immunity provision alleged applicable by the railroad did not even apply to private nuisance claims, but only exempted liability from civil or criminal suits brought by the state. The Supreme Court held:

> Plainly the engine-house and repair-shop, as they were used by the railroad company, were a nuisance in every sense of the term. They interfered with the enjoyment of property which was acquired by the plaintiff long before they were built, and was held as a place for religious exercises, for prayer and worship; and they disturbed and annoyed the congregation and

> Sunday-school which assembled there on the Sabbath and on different evenings of the week. That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation physically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer, and when the cause of the annoyance and discomfort are continuous, courts of equity will interfere and restrain the nuisance. *Crump v.. Lambert*, L.R. 3 Eq. 409.

Id. (emphasis added). The Supreme Court continued:

> Whatever the extent of the authority conferred, it was accompanied with this implied qualification that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred.

108 U.S. at 331, 2 S.Ct. at 728. (emphasis added). In *Fifth Baptist Church*, the railroad needed a repair shop, but the

Supreme Court said the remedy is to remodel the repair shop to "prevent" the nuisance complained of, and if that was not possible, the repair shop would need to be moved. *108 U.S. at 334, 2 S.Ct. at 730.* In the present case, the states of Washington and Oregon have shown that the farmers do not need to burn. *See* Memorandum Opinion and Order Denying Defendants' Motion to Dismiss at p. 30; testimony of Grant Pfifer, Washington Department of Ecology that since the state of Washington curtailed burning of grass seed stubble, grass seed production is actually little *higher.* Farmers in those states can competitively grow grass seed without burning. In *Fifth Baptist Church* the Supreme Court said: "Whatever prevents the comfortable use of the property for that purpose [a church] by the members of that corporation ... is a disturbance and annoyance, as much so as if access by them to the church was impeded and rendered inconvenient and difficult." 108 S.Ct. at 330, 2 S.Ct at 727. (emphasis added). In the present case, much more than the comfort of plaintiffs and the class members is at issue. It is their health and safety that are at issue.

It is important to discuss the *Bormann* decision, as both plaintiffs and the various groups of defendants have argued that case at length in their briefs and at oral argument.

Clay R. Smith, deputy attorney general for the State of Idaho, at oral argument claimed the Iowa Supreme Court erred in finding that the easement arose in that case by virtue of the immunity provision that was contained in their "right to farm" statute, because the easement was not authorized by the immunity provision in that statute, but rather by the county's authorization of the agricultural practice that

generated the offensive smells.[4] That argument has no logical merit. Essentially, the Attorney General's argument is "The Iowa Supreme Court erred because is was the county's authorization of an agricultural area, not the statutory immunity provision that caused the easement, that caused the taking." The logical flaw is that without the statutory immunity, there is no taking! That argument by the Attorney General was also contradicted by the Iowa Supreme Court's own language:

> The Board's approval of the agricultural area here triggered the provisions of *Iowa Code section 352.11(1)(a)*. More specifically, the approval gave the applicants immunity from nuisance suits. The neighbors contend that the approval with the attendant nuisance immunity results in a taking of private property without the payment of just compensation in violation of federal and state constitutional provisions.

584 N.W.2d 309 at 313. (emphasis added). The Iowa Supreme Court agreed with the neighbors' argument, and held:

> In enacting *section 352.11(1)(a)*, the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization

4. That argument is also found in Brief Amicus Curiae of the Idaho Attorney General in Support of House Bill 391's Constitutionality, pp. 11- 12.

> is in violation of the Fifth Amendment of the Federal Constitution and *article I section 18* of the Iowa Constitution.

584 N.W.2d 309 at 321. The Iowa Supreme Court found the remedy for that taking without just compensation was as follows: "We reverse and remand for an order declaring that portion of *Iowa Code section 352.11(1)(a)* that provides for immunity against nuisances unconstitutional and without any force or effect." *Id.* at 321-22. If the Idaho Attorney General's illogical argument were followed to its conclusion, the Iowa Supreme Court should have struck down the county's decision, not the state statute providing immunity. That is not what happened in Iowa, that is not what should result in the present case. Just as in *Bormann*, it is Idaho's immunity statue, Idaho Code § 22-4308A(6), that provides immunity against nuisance and trespass, and it is that provision which is unconstitutional.

The Idaho Attorney General then makes the argument that "Although a nuisance cause of action may have been a method for addressing that impact [in *Bormann*], the court cited no authority, and none exists, for the notion that the simple availability of such a claim against a private party constitutes "just compensation" for *inter alia*, Fifth Amendment purposes." Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, p. 13. First, the nuisance claim is not "just compensation," as the Idaho Attorney General argues. The Iowa Supreme Court made it clear in *Bormann* that "the legislature has exceeded its authority ... by authorizing the use of property in such a way as to infringe on the rights of

others by allowing the creation of a nuisance without the payment of just compensation ... in violation of the Fifth Amendment of the Federal Constitution and *article I section 18* of the *Iowa Constitution." 584 N.W.2d 309 at 321.* The reason the elimination of the nuisance claim is a taking without just compensation is because elimination of that nuisance claim creates an "easement" in others' property, and if the offending party does not pay for such easement because of statutory immunity, there is a taking without compensation. The Iowa Supreme Court made that clear when it wrote:

> Thus, the nuisance immunity provision in *section 352.11(1)(a)* creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do acts on their own land which, were it not for the easement, would constitute a nuisance. For example, in their farming operations the applicants would be allowed to generate "offensive smells" on their property which without the easement would permit affected property owners to sue the applicants for nuisances. *See Iowa Code § 352.2(6); see also Buchanan v. Simplot Feeders Ltd. Partnership, 134 Wash.2d 673, 952 P.2d 610, 615 (1998)* (holding that Washington's Right-to-Farm Act gives farm quasi easement, against urban developments that subsequently locate next to farm, to continue nuisance activities) (dictum).

584 N.W.2d 300 at 316. Second, the Idaho Attorney General is mistaken when as quoted above, he argues: "the [*Bormann*

] court cited no authority, and none exists, for the notion that the simple availability of such a claim against a private party constitutes 'just compensation' for *inter alia*, Fifth Amendment purposes." The following lengthy quote from *Bormann* shows, the Attorney General's argument is simply wrong, there *is* authority and it *was* cited:

> (c) Liability of government for a taking by the operation of a nuisanceproducing governmental enterprise. With regard to private nuisances,
>
> [t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably.... It has been broadly stated, as an additional limitation to the power of the legislature, that ... the legislature may not authorize the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the maintenance of a nuisance injurious to private property without due compensation.

66 C.J.S. *Nuisances* § 7, at 738 (1950).

Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle

in *Richards*, holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards, 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; see also Pennsylvania R.R. v. Angel, 41 N.J. Eq. 316, 7 A. 432, 433 (1886)* ("[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.").

A number of state courts have decided takings cases on the basis that the government entity operated a nuisance-producing enterprise. *See, e.g., Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100, 106 (1962)* ("[A] taking occurs whenever government acts in such a way as substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called 'nuisance." '). Significantly, a large number of these cases deal with smoke and odors from sewage disposal plants and city dumps. One commentator describes the cases this way:

> Typically, a city sewage plant or dump in the vicinity of, but not necessarily directly adjacent to, the plaintiff's land has wafted its noxious smoke, odors, dust, or ashes, usually combinations of these, over the plaintiff's land, with the obvious result of lessening its enjoyment. No physical touching is present, nor do the courts try to equate

> the municipal acts with touchings. [Several states] have allowed eminent domain compensation in cases of this kind.... More significant than a court's language is the result it announces, and in this respect all the decisions stand for the proposition that nuisance-type activities are a taking....

Stoebuck, at 226-27; *see also* Nichols § 6.07, at 6-112 to 6-113 ("[G]eneration of offensive odors, gases, smoke ... may constitute a taking.").

The commentator ascribes a name to the theory of these cases: condemnation by nuisance. Stoebuck, at 226. And the commentator has formulated the theory this way: "governmental activity by an entity having the power of eminent domain, which activity constitutes a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." *Id.* at 208-09; *see also City of Georgetown v. Ammerman, 143 Ky. 209, 136 S.W. 202, 202 (1911)* (holding that odors from city dump adjacent to plaintiff's property created a nuisance that was a taking of the property); *Ivster v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88, 88-90 (1939)* (holding as part of fundamental law of North Carolina that odors from disposal plant next to plaintiff's property constituted a nuisance and were a taking; North Carolina has no constitutional provision for a "taking"); *Brewster v. City of Forney*, 223 W.W. 175, 178 (Tex.Com.Ct.App.1920) (holding under Texas Constitution that odors from a nearby sewage disposal plant resulted in a taking of plaintiff's property); Nichols § 6.07, at 6-112 (stating under broad view of property—right to use, exclude, and dispose— there need

not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of property ownership is considered a taking).

One court long ago anticipated the so-called condemnation by nuisance theory this way:

> Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

Pennsylvania R.R. v. Angel, 7 A. at 433-34.

Our own definition of a taking is in accord with this concept:

> [A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

Phelps v. Board of Supervisors of County of Muscatine, 211 N.W.2d 274, 276 (Iowa 1973) (holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than

previously was a "taking" within the meaning of the Iowa Constitution).

As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of *section 352.11(1)(a)*. The approval gave the applicants immunity from nuisance suits. (Significantly, *section 352.2(6)* allows an agricultural area to include activities such as the creation of noise, odor, dust, or fumes.) This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking of private property for public use in violation of *article I, section 18 of the Iowa Constitution*.

In enacting *section 352.11(1)(a)*, the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and *article I, section 18* of the Iowa Constitution. The district court erred in concluding otherwise. 584 N.W.2d 300 at 319-320.

The Idaho Attorney General then claims *Bormann* is not applicable in Idaho due to the Idaho Supreme Court's ruling last year in *Covington v. Jefferson County, 137 Idaho 777,*

53 P.3d 828 (2002). Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, pp. 13-15. The various groups of defendants made similar arguments. Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional Submitted by Defendants Wayne Meyer at al., pp. 15-16; Lampert Farm & Ranch et al. Memroandum in Opposition to Plaintiffs' Motion to Decleare HB 391 Unconstitutional, pp. 6-10.

As correctly noted by defendants Meyer et al., in *Covington* the plaintiffs lived near a gravel pit and asphalt plant operation that had received a special use permit for operation from Jefferson County, and the plaintiffs alleged an inverse condemnation taking under both the United States and Idaho Constitutions due to the landfill's causing flies, dust and disturbing odors. Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional Submitted by Defendants Wayne Meyer at al., p. 15; *137 Idaho 777, 779, 53 P.3d 828, 830*. In rejecting those claims, the Idaho Supreme Court noted that a taking under Idaho's Constitution requires more than a claim that the property be merely "damaged" or that there is a diminution in the value of the property. *Id.; 137 Idaho at 780-81, 53 P.3d at 831-32*. The Idaho Supreme Court also rejected the Covington's claims under the federal constitution because they had not alleged that they had been permanently deprived of all economic uses of their land. *Id., pp. 15-16; 137 Idaho at 781-82, 53 P.3d at 832-33*. The problem in arguing that *Covington* overrules *Bormann* is simply *Covington* is not a nuisance case, and *Bormann* is not an inverse condemnation case. In a footnote, the Idaho Supreme Court specifically

noted *Covington* is not a nuisance case, when it rejected the Covingtons' federal taking claim, noting:

> The Covingtons argue a physical invasion of their land has taken place due to increased traffic, dust, flies and noise that drift onto their property from across the street. This activity may constitute a nuisance claim which is not before this court.

137 Idaho at 781, 53 P.3d at 832, n. 2. The Idaho Supreme Court then made it clear it was rejecting "Covingtons' claim for inverse condemnation." *137 Idaho at 782, 53 P.3d at 833.* The Idaho Attorney General argues: "This footnote drew precisely the distinction that the *Bormann* court did not and properly identified that, while conduct may give rise to a nuisance action, it need not form a predicate for a just compensation claim." Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, p. 14. In that footnote the Idaho Supreme Court clearly drew no such distinction that a nuisance cause of action could not be a predicate for a just compensation claim. The Idaho Supreme Court clearly stated that the facts in *Covington* could certainly amount to a nuisance claim. In no way did the Idaho Supreme Court state that elimination of that nuisance claim would not amount to a taking. That is the specific question which *Bormann* addressed. The Attorney General continues: "Plaintiffs here effectively ask this Court to deem the claims interchangeable by holding that *Idaho Code § 22-4803A(6)*, insofar as it precludes a nuisance or trespass claim, somehow precludes a just compensation claim against the State. It plainly does not foreclose an inverse condemnation claim." *Id.*, pp. 14-15. This is similar to

counsel for defendants Wayne Meyer et al.'s statement at oral argument that plaintiffs' constitutional challenge is "in the wrong courtroom," that these arguments should be raised in the lawsuit filed by the same plaintiffs against the State of Idaho claiming a taking by the State of Idaho. Those arguments ignore yet another distinction between *Bormann* and the present case on one hand, and *Covington*. The statute at issue in *Covington* was a zoning ordinance, and while the county designation of an agricultural area in *Bormann* was akin to a zoning ordinance, it was the Iowa statutory immunity from nuisance suits that caused a taking without compensation and their state immunity statute to be unconstitutional. The Iowa Supreme Court correctly noted:

> Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The [United States] Supreme Court firmly established this principle in *Richards*, holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards, 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091.*

584 N.W.2d 309, 319-320. In the present case, the Court is faced with a statute that prohibits the plaintiffs from protecting their homes and property rights. Again, we need to go back to the distinction discussed above, that is, the Idaho Supreme Court specifically noted the plaintiffs in

Covington still had an avenue available to them to protect their rights ... a nuisance claim. *137 Idaho at 781, 53 P.3d at 832, n. 2.* In the present case, that is exactly what is being sought to be protected by plaintiffs, and it is exactly what the legislature recently took away through Idaho Code § 22-4802A(6).

The Idaho Attorney General and the various groups of farmer defendants essentially argue, look, plaintiffs, your claim lies in an inverse condemnation proceeding, and you haven't alleged one in this case. The Idaho Supreme Court in *Covington* said an inverse condemnation proceeding is not available for a regulatory taking under the facts in that case. The Idaho Attorney General argues that the facts of this case, in light of the *Covington* factors (no actual physical taking, no permanent taking), show no regulatory taking would be allowed in the present case. Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, pp. 13-14. If this Court were to analyze the field burning smoke itself as a regulatory taking under *Covington*, an important distinction between the present case and *Covington* is that the Idaho Supreme Court specifically noted the Covingtons alleged "... no loss of access to or denial of any use of the Covingtons' property." *See, e.g. Hughes v. State, 80 Idaho 286, 295, 328 P.2d 397, 402 (1958)* (destroyed right of access constitutes a taking)." *137 Idaho at 781, 53 P.3d at 832.* In the present case, plaintiffs allege loss of access to their homes, a denial of use of their homes and interference with their exclusive right of possession. This is a crucial distinction, as the Idaho Supreme Court in *Covington* (citing *Hughes*), held that a loss of access or denial of use of property constitutes a taking. But that is a crucial distinction only in a pure regulatory takings analysis.

Appendix B

What *Covington* ALSO says, is, that under the facts of *Covington*, and even more so in the present case, a nuisance cause of action remains. *137 Idaho at 781, 53 P.3d at 832, n. 2.* Eight months after *Covington* was decided, the Idaho legislature passed HB 391, which eliminated the nuisance cause of action. The bottom line is, the plaintiffs in the present case (and the plaintiffs in *Covington*) are now without a remedy, unless that provision in HB 391 granting immunity (*Idaho Code § 22-4803A(6))* is unconstitutional. *Bormann* tells us it is in fact clearly unconstitutional.

Defendants Lampert Farm & Ranch et al. argue the *Bormann* decision only protected a property right in a cause of action. Lampert Farm & Ranch et al. Memorandum in Opposition to Plaintiffs' Motion to Declare HB 391 Unconstitutional, p. 12, citing *584 N.W.2d at 316.* That is incorrect. In Iowa, just as in Idaho, a right to maintain an easement over the land of another is an easement. *584 N.W.2d at 315. Sinnett v. Werelus, 83 Idaho 514, 520, 365 P.2d 952, 955 (1961). Bormann* expressly held that "the nuisance immunity provision is *section 352.11(1)(a)* creates an easement in the property affected by the nuisance (the servient tenement) in favor of the applicants' land (the dominant tenement). This is because the immunity allows the applicants to do on their own land which, were it not for the easement, would constitue a nuisance." *584 N.W.2d at 316.* Then the *Bormann* Court held:

> In enacting *section 352.11(1)(a)*, the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others

> by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and *article I, section 18* of the Iowa Constitution.

584 N.W.2d at 321. *Bormann* doesn't protect a property right in a nuisance cause of action. *Bormann* declares that the legislature's immunization of a nuisance creates an easement without the payment of compensation, and that is what was held to be unconstitutional.

Another argument raised by some of the defendants is that in Iowa, the legislature cannot modify the common law, but in Idaho the legislature can. McLean et al.'s Memorandum in Opposition, pp. 10-11. Lampert Farm & Ranch et al.'s Memroandum in Opposition to Plaintiffs Motion to Declare HB 391 Unconstitutional, pp. 6-8. However, in Iowa, the legislature *does* have the ability to modify common law rights. *McKiness Excavating & Grading, Inc. v. Morton Bldgs., 507 N.W.2d 405, 410 (Iowa 1993)*. In Idaho, the legislature has the authority to "... modify the common law with few exceptions." *Jones v. State Board of Medicine, 97 Idaho 859, 555 P.2d 399 (1976)*; *citing State v. McCoy, 94 Idaho 236, 486 P.2d 247 (1971)*(dictum). The premise of defendants' argument is wrong. The next question to be asked is what are the "few exceptions" to the Idaho legislature's authority to modify common law? Obviously, constitutionality of legislation is one of those "few exceptions." It is fundamental that the legislature must comply with constitutional constraints, so constitutionality is one of the "few exceptions" referenced in *Jones v. State*

Board of Medicine. The legislature cannot modify the common law if doing so results in a constitutional violation. Both briefs also cite *Webb's Fabulous Pharmacies v. Beckwith, 449 U.S. 155, 161 (1980)* for the proposition that state law determines the existence of a property right. McLean et al.'s Memorandum in Opposition, pp. 10-11. Lampert Farm & Ranch et al.'s Memorandum in Opposition to Plaintiffs Motion to Declare HB 391 Unconstitutional, p. 6.[5] Implicit in that argument is the legislature can choose to abolish plaintiffs' nuisance and trespass causes of action. The Idaho legislature can so choose, and it made that choice in this case. However, nothing in *Webb's Fabulous Pharmacies* allows any state legislature to violate the federal or its own state's constitution in so doing.

There is one important difference between the present case and *Bormann.* In *Bormann* the Iowa Supreme Court noted: "The neighbors concede, as they must, that their challenge to section 352 .11(1)(a) is a facial one because the neighbors have presented neither allegations nor proof of nuisance." *584 N.W.2d 309, 313.* The facts in the present case are much stronger in favor of plaintiffs. The plaintiffs

5. Plaintiffs argue that defendants' claim that Webb stands for the proposition that property rights are determined solely by state law is incorrect. Plaintiffs argue that the Supreme Court in *Webb* held that property rights are created and defined by "existing rules or understandings that stem from" a source independent from the Constitution "such as state law." Plaintiffs' Combined Reply Re: Constitutionality of HB 391, p. 2, n. 2 citing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). This Court's reading shows plaintiffs' interpretation is more accurate. In any event, nothing in Webb's Fabulous Pharmacies allows any state legislature to violate the federal or its own state's constitution.

in the present case have not only alleged facts which show a nuisance, they have proven facts at one preliminary injunction hearing and proved a nuisance, and they have withstood a summary judgment filed against them on the issue of nuisance. The fact that *Bormann* dealt with a "facial" challenge to the Iowa statute, and the fact that the Iowa Supreme Court held that it was "not a close case" that the statute was "flagrantly-unconstitutional" (*Id.*, at 322), shows that the facts present in the present case, coupled with the law, make an even stronger showing that *Idaho Code § 22-4803A(6)* is unconstitutional.

Bormann went through a regulatory taking analysis (584 N.W.2d 315-321), because the neighbors claimed the statutory immunity created an easement over their property in that it allowed the applicants to maintain a nuisance on their property. *584 N.W.2d 309, 313.* "The creation of the easement, the neighbors conclude, results in an automatic or per se taking under a claim of regulatory taking." *Id. Covington* also addressed a regulatory taking, which *Bormann* discussed, and like the Idaho Supreme Court noted in *Covington*, you need to have a permanent physical invasion. The Bormann court discussed cases like *Pumpelly v. Green Bay & Mississippi Canal Co., 30 U.S. 166, 181, 20 L.Ed. 557, 561 (1871)* which held:

> Where real estate is actually invaded by superinduced additions of water, earth, sand, or other material, or by having any artificial structure placed on it, so as to effectually destroy or impair its usefulness, it is a taking, within the meaning of the constitution.

Id. (emphasis added). The *Bormann* court then discussed the taking caused by flight easements near airports (*United States v. Causby, 328 U.S. 256, 266-67, 66 S.Ct. 1062, 1068, 90 L.Ed. 1206, 1213 (1946)*; *Griggs v. Allegheny County, 369 U.S. 84, 89, 82 S.Ct. 531, 533-34, 7 L.Ed.2d 585 (1962)*; *Dolezal v. City of Cedar Rapids, 209 N.W.2d 84, 87 (Iowa 1973)*) and firing navy coastal guns over property (*Portsmouth Harbor Land & Hotel Co. v. United States, 260 U.S. 327, 43 S.Ct. 135, 67 L.Ed. 287 (1922). 584 N.W.2d at 317, 318.* Certainly the Idaho Supreme Court has embraced these types of takings in *Tibbs v. City of Sandpoint, 100 Idaho 667, 603 P.2d 1001 (1979)*, when it directed trial judges in the future to look at the factors in *Causby* and *Jensen v. United States, 305 F.2d 444, 447, 158 Ct.Cl. 333 (Ct.Cl.1962)*, to determine when the interference becomes so serious so as to constitute a taking: the frequency and level of flights, the type of planes, uses of the property, the effect on values, reasonable reactions of humans below, and the impact upon animals and vegetable life. *100 Idaho 667, 671, 603 P.2d 1001, 1005.* After all that discussion, the Iowa Supreme Court noted that *Richards v. Washington Terminal Co., 233 U.S. 546, 34 S.Ct. 654, 58 L.Ed. 1088 (1914)* "presents a factual scenario closer to the facts of this case." *584 N.W.2d at 319.* The Iowa Supreme Court held:

> In *Richards*, the plaintiff owned residential property along the tracks of a railroad that had the power of eminent domain. The property lay near the mouth of a tunnel. The Court recognized that two kinds of the railroad's activities had partially destroyed the plaintiff's interest in the enjoyment of his property. The first kind involved

smoke, dust, cinders, and vibrations invading the plaintiff's property at all points at which the property abutted the tracks. The second kind involved gases and smoke emitted from engines in the tunnel that contaminated the air and invaded the plaintiff's property. A fanning system inside the tunnel forced the emission of the gases and smoke from the tunnel. As to the first activity, the Court denied compensation because it was the kind of harm normally incident to railroading operations. *Id.* at 554-55, *34 S.Ct. at 657-58, 58 L.Ed. at 1091-92.* As to the second activity—gases and smoke from the tunnel—the Court concluded the plaintiff was entitled to compensation for the "special and peculiar damage" resulting in diminution of the value of the plaintiff's property. *Id. at 557, 34 S.Ct. at 658, 58 L.Ed. at 1093.*

Richards is viewed as recognizing the taking of a property interest or right "to be free from 'special and peculiar' governmental interference with enjoyment." Stoebuck, at 220. The taking involved "no kind of physical taking or touching—none whatever." *Id.* Viewed in this light, *Richards* "entirely does away with the requirement of a physical taking or touching." *Id; see* Nichols § 6.01, at 6-9 n. 11 ("It is not necessary, in order to render a statute obnoxious to the restraint of the Constitution, that it must in terms or in effect authorize an actual physical taking of the property or thing itself, so long as it affects its free use and enjoyment...."). *584 N.W.2d at 319.* (emphasis added). After this takings and regulatory takings analysis, that the Iowa

Supreme Court next analyzed whether immunization of a nuisance and the resulting easement was a taking. This is also where footnote 2 in *Covington* comes into play *(137 Idaho at 781, 53 P.3d at 832, n. 2)*, because that is where the Idaho Supreme Court recognized that the type of activity in *Covington* may well result in a nuisance claim. The following section of *Bormann* (repeated from *infra* a pages 16-18 for the convenience of the reader) shows the analysis of why the taking of that nuisance claim by the legislature, and the resulting easement placed upon one's land, causes an outright taking without compensation, and is an unconstitutional act:

(c) Liability of government for a taking by the operation of a nuisanceproducing governmental enterprise.

With regard to private nuisances,

> [t]he power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. The power cannot be exercised arbitrarily, or oppressively, or unreasonably.... It has been broadly stated, as an additional limitation to the power of the legislature, that ... the legislature may not authorize the use of property in such a manner as unreasonably and arbitrarily to infringe on the rights of others, as by the creation of a nuisance. So it has been held that the legislature has no power to authorize the

> maintenance of a nuisance injurious to private property without due compensation.

66 C.J.S. *Nuisances* § 7, at 738 (1950).

Thus, the state cannot regulate property so as to insulate the users from potential private nuisance claims without providing just compensation to persons injured by the nuisance. The Supreme Court firmly established this principle in *Richards*, holding that "while the legislature may legalize what otherwise would be a public nuisance, it may not confer immunity from action for a private nuisance of such a character as to amount in effect to a taking." *Richards, 233 U.S. at 553, 34 S.Ct. at 657, 58 L.Ed. at 1091; see also Pennsylvania R.R. v. Angel, 41 N.J. Eq. 316, 7 A. 432, 433 (1886).* ("[A]n act of the legislature cannot confer upon individuals or private corporations, acting primarily for their own profit, although for public benefit as well, any right to deprive persons of the ordinary enjoyment of their property, except upon condition that just compensation be first made to the owners.").

A number of state courts have decided takings cases on the basis that the government entity operated a nuisance-producing enterprise. *See, e.g., Thornburg v. Port of Portland, 233 Or. 178, 376 P.2d 100, 106 (1962)* ("[A] taking occurs whenever government acts in such a way as

substantially to deprive an owner of the useful possession of that which he owns, either by repeated trespasses or by repeated nontrespassory invasions called 'nuisance." '). Significantly, a large number of these cases deal with smoke and odors from sewage disposal plants and city dumps. One commentator describes the cases this way:

> Typically, a city sewage plant or dump in the vicinity of, but not necessarily directly adjacent to, the plaintiff's land has wafted its noxious smoke, odors, dust, or ashes, usually combinations of these, over the plaintiff's land, with the obvious result of lessening its enjoyment. No physical touching is present, nor do the courts try to equate the municipal acts with touchings. [Several states] have allowed eminent domain compensation in cases of this kind.... More significant than a court's language is the result it announces, and in this respect all the decisions stand for the proposition that nuisance-type activities are a taking.... Stoebuck, at 226-27; *see also* Nichols § 6.07, at 6-112 to 6-113 ("[G]eneration of offensive odors, gases, smoke ... may constitute a taking.").

The commentator ascribes a name to the theory of these cases: condemnation by nuisance.

Stoebuck, at 226. And the commentator has formulated the theory this way: "governmental activity by an entity having the power of eminent domain, which activity constitutes a nuisance according to the law of torts, is a taking of property for public use, even though such activity may be authorized by legislation." *Id.* at 208-09; *see also City of Georgetown v. Ammerman, 143 Ky. 209, 136,* S.W. 202, 202 (1911) (holding that odors from city dump adjacent to plaintiff's property created a nuisance that was a taking of the property); *Ivester v. City of Winston-Salem, 215 N.C. 1, 1 S.E.2d 88, 88-90 (1939)* (holding as part of fundamental law of North Carolina that odors from disposal plant next to plaintiff's property constituted a nuisance and were a taking; North Carolina has no constitutional provision for a "taking"); *Brewster v. City of Forney, 223 S.W. 175, 178 (Tex.Com.Ct.App.1920)* (holding under Texas Constitution that odors from a nearby sewage disposal plant resulted in a taking of plaintiff's property); Nichols § 6.07, at 6-112 (stating under broad view of property—right to use, exclude, and dispose— there need not be a physical taking of the property or even dispossession; any substantial interference with the elemental rights growing out of property ownership is considered a taking).

One court long ago anticipated the so-called condemnation by nuisance theory this way:

Appendix B

> Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional sense.

Pennsylvania R.R. v. Angel, 7 A, at 433-34.

Our own definition of a taking is in accord with this concept:

> [A] "taking" does not necessarily mean the appropriation of the fee. It may be anything which substantially deprives one of the use and enjoyment of his property or a portion thereof.

Phelps v. Board of Supervisors of County of Muscatine, 211 N .W.2d 274, 276 (Iowa 1973) (holding that construction of a bridge and causeway over river in such a manner as to allegedly cause greater flooding on adjacent property than previously was a "taking" within the meaning of the Iowa Constitution).

Appendix B

As mentioned, the Board's approval of the applicants' application for an agricultural area triggered the provisions of section 352.1191)(a). The approval gave the applicants immunity from nuisance suits. (Significantly, section 352(6) allows an agricultural area to include activities such as the creation of noise, odor, dust, or fumes.) This immunity resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution. This also amounts to a taking of private property for public use in violation of *article I, section 18, of the Iowa Constitution*.

In enacting *section 352.11(1)(a)*, the legislature has exceeded its authority. It has exceeded its authority by authorizing the use of property in such a way as to infringe on the rights of others by allowing the creation of a nuisance without the payment of just compensation. The authorization is in violation of the Fifth Amendment to the Federal Constitution and *article I, section 18* of the Iowa Constitution.

The district court erred in concluding otherwise.

This is where *Covington's* footnote 2 is so important. *137 Idaho at 781, 53 P.3d at 832, n. 2.* In that footnote, the Idaho supreme Court recognized that the type of activity in *Covington*, while not amounting to a regulatory taking, may well result in a nuisance claim. *Bormann* holds that the Iowa legislature exceeded its authority by granting immunity for nuisance, because doing so is an outright taking without just compensation.

Many cases have been cited to this Court, and this Court has reviewed the text of those cases furnished by counsel for both sides of this dispute. The Court has observed three distinctions between the facts of the present case and many of the cases cited to this Court. First, HB 391 and specifically Idaho Code § 22-22-4803A(6) allows defendant farmers to do an "act" which plaintiffs have proven, up to this point in time, will cause injury to certain individuals. In most of the cases cited, the "act" (smell from a landfill, airplanes overhead, locomotive smoke and noise), causes only an inconvenience, rather than a health hazard or an injury producing event. The present case concerns plaintiffs' and class members' ability to breathe, and their need to leave their property when burning occurs or risk injury. Second, most of the cases concern a nuisance or trespass from an adjoining or nearby landowner. In the present case, because of the amount of smoke and the uncontrollability of that smoke, many of those plaintiffs affected by defendants' smoke are somewhat distant, some are adjacent. Third, most of the cases cited concerned a defendant who was doing an activity which had a fairly obvious "public benefit" (landfill, public transportation, etc.), and there was a need for that public benefit (ie., we need to put our garbage somewhere,

we need to put the railroad tracks and airport runways somewhere). In the present case, the legislature stated the public benefit is that grass seed somehow protects water quality. *Idaho Code § 22-4801* as amended. Assuming that is a legitimate public benefit, the stated public benefit is that *growing* grass seed protects water quality. There is nothing in the stated public benefit that says *burning* grass seed stubble protects water quality. Implicit in the stated public benefit is the argument that if the farmers are not allowed to burn, the crop will not be grown. Washington and Oregon farmers have proven field burning is not a necessary practice to produce an economically viable grass seed crop. Grant Pfifer, in charge of Air Quality for the Washington Department of Ecology testified at the August 9, 2002 hearing on the temporary restraining order, testified that since the state of Washington curtailed burning of grass stubble, grass seed production is a little *higher* at present as compared to before the ban. This was noted almost ten months ago in this court's Memorandum Opinion and Order Denying Defendants' Motion to Dismiss at p. 30.[6] Thus, giving all

6. At page 30 of that August 19, 2002 decision, this Court held:

> An aspect of that crop (burning) is simply not necessary. Depending on which experts the Court believes, there is an economic benefit to the farmer who doesn't burn, or, there is some economic detriment to the farmer who doesn't burn. There is nothing that says any of these farmers *must* plant grass seed. It is a choice they make each year. It is obviously an economically lucrative crop to plant, or they wouldn't plant the grass crop in the first place. However, it is the general public (not a party to this case) and especially those with breathing problems

(Cont'd)

reasonable inferences to the public benefit as stated by the legislature in *Idaho Code § 22-4801*, there simply is no *need* to burn.

The stated public benefit is important to an analysis of a statute under a regulatory takings claim, such as where the use of one's property is sought to be restricted. Plaintiffs argue: "thus, the State in this case has granted the defendants a property right and taken it from plaintiffs for a purported public use—to benefit that portion of the agricultural industry that conducts open burning ." Plaintiffs' Combined Reply Re: Constitutionality of HB 391, p. 13. What does the statute say about the public benefit? The new *Idaho Code § 22-4801*, amended by HB 391 has the following new language shown in *italics:*

> It is the intent of the legislature to promote agricultural activities *while at the same time protecting public health. The legislature finds that due to the climate, soils and crop rotations unique to north Idaho counties, crop residue burning is*

(Cont'd)

> (some of whom are parties to this case), who are damaged each year by the grass field burning. Those parties with breathing problems have historically in essence "paid" a price to "subsidize" those farmers' grass seed crops. The production of grass seed has been in effect "subsidized" for many years because the farmers have historically not paid for the damage caused by the nuisance and trespass caused by the burning of grass seed residue. The motions to dismiss, if granted, would allow that status to remain into the future. The law does not permit citizens' damage to be without a remedy.

> *a prevalent agricultural practice and that there is an environmental benefit to protecting water quality from the growing of certain crops in environmental areas. It is the intent of the legislature to reduce the loss to the state of its agricultural resources by providing a safe harbor to farmers when burning crop residue in compliance with this chapter and limiting the circumstances under which agricultural operations may be exposed to claims outside of the lawful framework for crop residue burning.*

Again, the new statutory language does not say "burning protects water quality," the statute says the crop which the legislature is protecting protects water quality. Implicit in that is the thought that if these farmers are not allowed to burn, they won't grow this crop for which there is an environmental benefit. But the fallacy here again is, there is no need to burn. The state of Washington and the state of Oregon and free markets have proven that. One other obvious problem is the legislature's logic as to how taking away nuisance and property rights of the citizens of the State of Idaho regarding crop burning is in any way "protecting public health." Under *Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978)*,[7] use restriction legislation requires a

7. At oral argument, deputy Idaho Attorney General referenced *Brown v. Legal Foundation of Washington, et al.*, 155 L.Ed.2d 376, 123 S.Ct. 1406 (March 26, 2003), which interprets Penn Central and many of the other cases previously cited to this Court. This Court has reviewed Brown, and it does not change this Court's analysis. Under a physical takings analysis, it matters not if the entire parcel is taken or merely a part thereof, and compensation is mandated even when the use is temporary. 123 S.Ct. at 1418.

balancing approach. A use restriction on property is a taking if the use restriction is not reasonably necessary to a substantial public purpose *or* "if it has an unduly harsh impact upon the owner's use of the property." *438 U.S. at 127.* (underline added). Under this analysis, all that is needed is one of those two conditions in order for the restriction to be unconstitutional. In the present case, both are present. As shown above, the stated public purpose of the statute is a fallacy as there is no need to burn to produce an economically viable crop. If the restriction is not reasonably necessary to a substantial public purpose, there is a taking. *Also*, if the restriction has an unduly harsh impact on the owner's property, there is a taking. Again, up to the present time, plaintiffs have proved injury and an inability to use ther property, caused by defendants' smoke.

Finally, there are two reasons the unconstitutionality of *Idaho Code § 22-4803A* should come as no surprise. First, this Court held almost ten months ago, when it found that *Idaho Code § 52-108* (Idaho's Right to Farm Act) was constitutional, the only way that statute could be constitutional was if it applied only to public nuisances, because if it applied to abolish private nuisances as well, there would be a taking without compensation, and thus, it would be unconstitutional. The Court wrote:

> The choice here is 1) *Idaho Code § 52-108* applies only to public nuisances and is constitutional, or, 2) if *Idaho Code § 52-108* applies to private nuisances (as well as public nuisances), there is a taking (*see Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108*

> *U.S. 317, 331 (1883)* and *Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1914)*), and if there is no remedy available to citizens for that taking, then *Idaho Code § 52-108* is unconstitutional. The power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. 66 C.J.S. *Nuisances* § 7, at 738 (1950). That quote also illustrates the choice this Court must make between the two alternatives. The Court chooses the constitutional interpretation, that *Idaho Code § 52- 108* only applies to shift the burden in public nuisance cases.

Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, p. 12. Second, the State of Idaho Attorney General, through its deputy attorney Steven W. Strack, told Idaho State Representative Douglas Jones in a March 7, 2003 letter that HB 226 would "unlikely" be viewed by a court as a "taking" of property rights, "especially since HB 226 leaves intact common law actions for trespass as well as nuisance." Steven W. Strack March 7, 2003 letter to Rep. Jones p. 3, Affidavit of R. Brent Walton in Support of Reply to Constitutionality of HB 391, Exhibit 2. The converse obviously applies, if you abolish common law actions for trespass and nuisance, it is likely a taking.

Appendix B

B. FUNDAMENTAL RIGHTS.

Plaintiffs claim that they and the class members have the inalienable right to enjoy life and the possession of their property. Plaintiffs' Memorandum in Support of Motion re: Constitutionality of HB 391, p. 5, pp. 24-26.

As stated by the Idaho Supreme Court in *Newland v. Child, 73 Idaho 530, 537, 254 P.2d 1066 (1953)*: "The right to own and enjoy private property is fundamental. It is one of the natural, inherent and inalienable rights of free men. It is not a gift of our constitutions, because it existed before them. Our constitutions embrace and proclaim it as an essential in our conception of freedom ."

Article I, section 1 of the Idaho Constitution states:

> All men are by nature free and equal, and have certain inalienable rights, among which are enjoying ... life and liberty; ... possessing and protecting property; pursuing happiness and securing safety.

Article 1, section 1 of the Idaho Constitution guarantees the inalienable right to own and enjoy private property and secure and defend life and liberty. As the Idaho Supreme Court has explained in discussing this constitutional guarantee:

> The right to own and enjoy private property is fundamental. It is one of the natural, inherent and inalienable rights of free men. It is not a gift of our constitutions, because it existed before them.

Appendix B

> Our constitutions embrace and proclaim it as an essential in our conception of freedom. This right of property, though of such high order, is nevertheless subject to reasonable limitation and regulation by the state in the interests of the common welfare. Indeed, a statute imposing any limitation upon the right must be supported by such purpose.

Newland v. Child, 73 Idaho 530, 537, 254 P.2d 1066, 1069 (1953). Newland tells us that any statute which would limit those fundamental rights, must be supported by the purpose supporting the interests of the common welfare. House Bill 391, specifically that portion which creates *Idaho Code § 22-4803A(6)*, limits plaintiffs' (and all other citizens of Idaho) fundamental rights. Thus, the Court needs to analyze what are the "interests of the common welfare."

The analysis of the statute's "public benefit" set forth immediately above applies. The intent of the statute is to "... promote agricultural activities while at the same time protecting public health." *Idaho Code § 22-4801* as amended. However, the only "public health" reason given in the statute is "... there is an environmental benefit to protecting water quality from the growing of certain crops in environmental areas." Once again, the new statutory language does not say "burning protects water quality", the statute says the crop which the legislature is protecting protects water quality. Implicit in that is the thought that if these farmers are not allowed to burn, they will no longer grow this crop for which there is an environmental benefit. But the fallacy here again is, there is no need to burn. The state of Washington and the state of Oregon and free markets have proven that.

Accordingly, the requirement of *Newland* that the "limitation" imposed by the statute (elimination of nuisance and trespass causes of action) must be in the "interests of the common welfare," is not met. *Idaho Code § 22-4803A(6)* is unconstitutional as violating *Idaho Constitution Article 1, Section 1.*

The legislature was also forewarned about this problem as well. Deputy Attorney General Steven W. Strack wrote to Idaho State Representative Douglas Jones on March 7, 2003, and told him that "the right to exclude others" and the "owner's right to prevent occupation of the property by other people or objects" "is so fundamental that where governmental action results in '[a] permanent physical occupation' of the property, by the government or others, a taking of the property is found to occur, 'without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner.' *Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 434-35 (1982).*" Steven W. Strack March 7, 2003 letter to Rep. Jones p. 3, Affidavit of R. Brent Walton in Support of Reply to Constitutionality of HB 391, Exhibit 2.

C. *IDAHO CONSTITUTION ART. III, § 19,* NO LOCAL OR SPECIAL LAWS.

Article III, section 19 of the Idaho Constitution prohibits certain "local" or "special laws." "The legislature shall not pass local or special laws in any of the following enumerated cases, that is to say: ... Affecting estates of ... minors, ... [or] Releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any person or

corporation in this state, or any municipal corporation therein ... [or] For limitation of civil or criminal actions." A law is not local "when it applies equally to all areas of the state." *Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 429, 708 P.2d 147 (1985)*. The test for determining whether a law is local or special is basically whether the legislature has singled out "persons or corporations for preferred treatment." *Concerned Taxpayers of Kootenai County v. Kootenai County, 137 Idaho 496, 499, 50 P.3d 991 (2002)*. Plaintiffs argue *Idaho Code § 22-4803A(6)* is a 'local or special law ." Plaintiffs argue: "This is hardly surprising since defendant Wayne Meyer, a state representative, was one of the moving forces behind the bill and is a farmer who torches his fields in North Idaho." Plaintiffs' Memorandum in Support of Motion Re: Constitutionality of HB 391, p. 23. Wayne Meyer is also a defendant in this lawsuit. While it would be naive to believe that this legislation was not passed in response to this litigation by these plaintiffs against these defendants, there has been no proof offered by plaintiffs as to the origins of this legislation, its legislative history, or Representative Wayne Meyer's involvement or the involvement of any other party. It would seem that such information was capable of being presented to the Court. At oral argument, counsel for plaintiffs claimed he was not allowed into executive sessions in Boise at the legislature, but there was no sworn testimony. There is simply no proof that the legislature has singled out "persons or corporations for preferred treatment."

However, the minimal legislative record does not end the inquiry. The Idaho Supreme Court in *Jones v. State Board of Medicine, 97 Idaho 859, 873-74, 555 P.2d 399 (1976)* complained about how the lack of a legislative record

hampered its equal protection analysis, yet it went on to draw from other literature "outside the parameters of the record in this case" (979 Idaho at 874). In the present case, the Court need not look outside the record to determine whether the statute has statewide or local impact. This law does limit "civil actions" in the ten northern counties of the State of Idaho. House Bill 391 limits civil actions via the new statutory language found in *Idaho Code § 22-4803A(6)*. Nothing in that statute pertains only to the ten northern counties in the State of Idaho, but *Idaho Code § 22-4803A(6)* references *Idaho Code § 22-4803* and *Idaho Code § 22-4803A(3)*, both of which are limited to the ten northern counties in the State of Idaho. The State of Idaho argues that the law applies to all agricultural burning in the state of Idaho, specifically, that *Idaho Code § 22-4801* shows that the "crop residue burn statute is statewide, not local." Brief *Amicus Curiae* of the Idaho Attorney General in Support of House Bill 391's Constitutionality, p. 21-22. Portions of *Idaho Code § 22- 4801* are statewide in scope, but the italicized portion below of *Idaho Code § 22-4801* clearly places the legislation back on northern Idaho counties: "... due to the climate, soils and crop rotations *unique to north Idaho counties*, crop residue burning is a prevalent agricultural practice ...". However, *Idaho Code § 22-4801* is not the provision to which plaintiffs address their argument. Plaintiffs' argument addresses only *Idaho Code § 22- 4803A(6)*, and that statute is specific to the ten northern counties, via *Idaho Code § 22-4803* and *Idaho Code § 22-4803A(3)*. Accordingly, *Idaho Code § 22-4803A(6)* is a special or local law because it does not apply "equally to all areas of the state." *Sun Valley Co. v. City of Sun Valley, 109 Idaho 424, 429, 708 P.2d 147 (1985).*

Even that does not end the inquiry. To be a special or local law, the classification must also be arbitrary, capricious, or unreasonable. *Kirkland v. Blaine County Medical Center, 134 Idaho 464, 4 P.3d 115 (2000)*. Again, this is where the origins of this legislation and its legislative history might be very relevant.[8] The Court was not presented that information. What the Court has regarding the intent of the statute is what the legislature has told us:

> It is the intent of the legislature to promote agricultural activities while at the same time

8. Once again, the legislature was warned that the lack of a well prepared record may hurt "the farmers". Deputy Attorney General Steven W. Strack's March 7, 2003 letter to Representative Douglas Jones reads at page 7:

> Absent a well-prepared record showing why farmers deserve to be treated differently than any other persons, House Bills 227 and 226 are likely to be held unconstitutional. The question to be asked may be "why is it that plaintiffs who are allegedly injured by smoke and/or odor from farming are the only citizens restricted in their opportunity to seek damages/injunctive relief?" A reviewing court will wonder how the field burning and/or odors is a "statewide concern" and how immunizing the farmers from personal liability serves "the health and welfare of the people of the state of Idaho." Also, since no factual basis has been presented that assists in answering such questions, the risk of a court finding the two statutes unconstitutional is significantly increased.

Steven W. Strack March 7, 2003 letter to Rep. Jones p. 7, Affidavit of R. Brent Walton in Support of Reply to Constitutionality of HB 391, Exhibit 2.

> protecting public health. The legislature finds that due to the climate, soils and crop rotations unique to north Idaho counties, crop residue burning is a prevalent agricultural practice and that there is an environmental benefit to protecting water quality from the growing of certain crops in environmentally sensitive areas. It is the intent of the legislature to reduce the loss to the state of its agricultural resources by providing a safe harbor to farmers when burning crop residues in compliance with this chapter and limiting the circumstances under which agricultural operations may be exposed to claims outside of the lawful framework for crop residue burning.

HB 391, *§ 1*; *Idaho Code § 22-4801*. The Court notes the statute does not say "burning protects water quality." Instead, the statute in essence says "the crop which the legislature is protecting, protects water quality." This protection implies that if these farmers are not allowed to burn, they will no longer grow this crop for which there is an environmental benefit. However, the fallacy again is, there is no need to burn. Again, Washington, Oregon and free markets have proven that fact. Accordingly, the stated purpose of the statute as written by the legislature, since it is based on that fallacy, is arbitrary, capricious and unreasonable. As a result, *Idaho Code § 22-4803A(6)* is a local or special law in violation of *Article III, section 19 of the Idaho Constitution*.

Appendix B

IV. RETROACTIVITY.

Due to the Court's ruling on the constitutionality of *Idaho Code § 22- 4803A(6)*, there is no need to rule on the retroactive or non-retroactive nature of that statute.

V. ORDER.

IT IS HEREBY ORDERED Plaintiffs' "Motion to Declare HB 391 Unconstitutional to the Extent it Purports to Extinguish any of the Rights of Plaintiffs and Members of the Class" is GRANTED as it pertains to Idaho Code § 28-4803A(6). This Court finds Idaho Code § 22-4802A(6) to be unconstitutional as it: (1) takes property without prior compensation or due process in violation of the Fifth and Fourteenth Amendment to the United States Constitution and *Article 1, Section 13* and *Section 14* of the Idaho Constitution; (2) violates *Article 1, Section 1 of the Idaho Constitution* because the "limitation" imposed by the statute is not in the "interests of the common welfare"; and (3) because it is a "local or special law" in violation of *Article III, section 19 of the Idaho Constitution.*

ENTERED this 4th day of June, 2003.

s/ John T. Mitchell
John T. Mitchell, District Judge

APPENDIX C — ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION OF THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI FILED APRIL 28, 2003

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

Case No. CV 2002 3890

LAWRENCE ("BUD") MOON, JR., et al.,

Plaintiffs,

vs.

NORTH IDAHO FARMERS ASSOCIATION,

Defendants.

ORDER GRANTING PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

I. BACKGROUND.

Plaintiffs filed their Motion for Class Certification on November 22, 2002, supported by Plaintiffs' Memorandum in Support of Motion for Class Certification filed the same date; and "Appendix A" (text of cited decisions) filed November 27, 2002. On January 10; 2003, defendants filed: "Defendants' Joint Memorandum in Opposition to Class

Certification", an Affidavit of Stewart D. Fried, and an Affidavit of Peter C. Erbland both relating to Defendants' Joint Memorandum in Opposition to Class Certification. Plaintiffs then filed Plaintiffs' Reply in Support of Class Certification on February 21, 2003. The matter was originally noticed for hearing on January 13, 2003, then moved to January 30, 2003, and finally moved to and heard March 6, 2003, and taken under advisement on that date. On March 26, 2003 defendants filed "Defendants' Statement of Additional Authority Regarding Plaintiffs' Motion for Class Certification" which simply furnished an additional case, *Lockheed Martin Corp., v Superior Court*, 131 Cal.Rptr.2d 1, 2003 Cal. LEXIS 1300 (March 3, 2003). The Court has reviewed all the above pleadings.

The plaintiffs have proposed two classes of plaintiffs in this action:

> (1) All children with a medically diagnosed inflammatory air ways disease including, but not limited to, asthma, sinusitis, emphysema, chronic obstructive pulmonary disease, and chronic bronchitis; or cystic fibrosis; or chronic heart disease, and who presently live in or within the last 3 years have lived in any region impacted by defendants' smoke.
>
> (2) All non-minor individuals with a medically diagnosed inflammatory airways disease including, but not limited to, asthma, sinusitis, emphysema, chronic obstructive pulmonary disease and chronic bronchitis; or,

> cystic fibrosis; or chronic heart disease, and who presently live in or within the last 3 years have lived in any region impacted by defendants' smoke. Motion for Class Certification, pp. 1-2.

II. ANALYSIS.

A decision to deny or grant a motion to maintain a class action is committed to the discretion of the trial court. If the district court properly applies the relevant criteria, its order should be reversed only for an abuse of discretion. *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 237; 646 P.2d 988, 1008 (1982) citing *Paton v. LaPrade*, 524 F.2d 862, 875 (3d Cir. 1975). Additionally, the Court must make specific findings establishing that the case satisfies the several requirements for certification. *Id.* Thus, the Court has wide discretion in formulating class certification, if at all. A court must conduct a "rigorous analysis" of Rule 23 before certification. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

Idaho Rule of Civil Procedure commands "broad use of class actions whenever the interests of the absentees can be adequately represented." *Bush v. Upper Valley Telecable Co.*, 96 Idaho 83, 89, 524 P.2d 1055, 1061 (1974).

The plaintiffs have the burden of proof in proving that this action qualifies as a class action under I.R.C.P. 23. *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982). The burden on the plaintiff is only to present a *prima facie* case. that an ascertainable class exists and that Rule 23 is satisfied.

Appendix C

Alvarado v. Carnation Co., 1995 U.S.Dist. LEXIS 10084, at *6 (D. Idaho 1995). In class certification, the court is bound to take the substantive allegations in the complaint as being true. *Murray v. Local 2620*, 192 F.R.D. 629, 631 (N.D.Cal. 2000). In resolving a class certification motion, a court may not assess the likelihood of success on the merits. *Blackie v Barrack*, 524 F.2d 891, 901 n. 17 (9th Cir. 1975). Thus, disputes defendants may have with the merits of plaintiffs' claims are not relevant at this juncture. *Bjustrom v. Trust One Mortgage Corp.*, 199 F.R.D. 346, 348 (W.D.Wash. 2001). The Idaho Supreme Court has stated: "An intelligent decision on class certification requires 'at least a preliminary exploration of the merits' of the plaintiffs' claim." *Pope v. Intermountain Gas Co.*, 103 Idaho 217, 237, 646 P.2d 988, 1008 (1982). The United States Supreme Court has a different mandate: "There is nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974): The court can go beyond the pleadings in making its determination. *In re Telectronics Pacing Sys. Inc.*, 172 F.R.D. 271, 282 (S.D. Ohio 1997). Both parties have urged this Court to go beyond the pleadings in determining this motion, and this Court has indeed reviewed much more than the pleadings in determining this and other motions in this matter. In ruling on a motion for class certification under Rule 23, courts resolve doubts in favor of permitting a class action, and should err in favor of and not against the maintenance of the class action. *Gavron v. Blinder Robinson & Co.*, 115 F.R.D. 318, 321 (E.D.Pa. 1987); *Gruber v. Price Waterhouse*, 117 F.R.D. 75, 78 (E.D.Pa. 1987); *In re Memorex Sec. Cases*, 61

F.R.D. 88, 93 (N.D.Cal. 1973). "Not only does liberal application of the rule avoid multiplicity of litigation, but (1) it saves members of the class the cost and trouble of filing individual suits; and (2) it also frees the defendant from harassment of identical future litigation." *Brown v. Brown*, 6 Wn.App. 249, 256-57, 492 P.2d 581, 585-86 (Wash.Ct.App. 1971).

Parties seeking class certification must meet the requirements of I.R.C.P. 23(a) and at least one prong of I.R.C.P. 23(b).

A. ANALYSIS OF CLASS DEFINITIONS.

Before analyzing under Rule 23(a) and (b), defendants argue that the "class definitions are improper." Defendants' Joint Memorandum in Opposition to Motion for Class Certification, pp. 18-24.

The first argument is that claims for nuisance and trespass require people of "normal susceptibilities", and that since plaintiffs are persons of hypersensitivity, they cannot pursue the claims of the class. *Id.* pp. 18-19. Defendants' arguments in this regard are not supported by the authority given by defendants. There has been no case cited which would indicate that persons suffering from chronic pulmonary conditions cannot bring a nuisance or trespass claim. Because no authority has been cited, defendants' argument is not-persuasive. Additionally; defendants' argument fails for the reasons set forth *supra* in footnote 1 and 2, and as set forth in this Court's Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, pp. 10-27. At oral

argument, defendants argued the Idaho Jury Instruction on nuisance refers to an objective person standard. Indeed, IDJI 491 states that defendants unreasonable interference with plaintiffs' use and enjoyment of life [note, plaintiff's interest in his or her land is alternative language], is determined objectively, which is to say that the question is not whether the plaintiff would regard the interference as being unreasonable, but whether reasonable persons generally looking at all the circumstances impartially and objectively, would consider it unreasonable (ie., a nuisance). Nothing in IDJI 491 indicates that reasonable persons could not mean reasonable persons with such health problems. Such an argument runs contrary to the philosophy that the defendant take the plaintiffs as they find them. These plaintiffs and the class to be certified, are people with such health problems. Defendants have shown no authority indicating that the appropriate nuisance standard in this case is whether other reasonable persons, with similar health problems, would consider the defendants smoke unreasonable, ie., a nuisance.

The defendants' second argument is that plaintiffs' proposed classes are improperly defined because they require individual examination of each plaintiff to determine class membership. *Id.* pp. 22-23. Defendants cite *Nicodemus v. Union Pacific Corp.*, 204 F.R.D. 479, 487(D.Wyo 2001) for the proposition that class definition must not "depend on subjective criteria". *Id.* p. 22. That argument was expressly rejectedin *In re "Agent Orange" Product Liability Litigation*, 100 F.R.D. 718, 728-29 (E.D.N.Y. 1983). There has been no case cited indicating that such well known, diagnosable diseases cannot be a criteria in the class certification. Further, even if Nicodemus were good law, having a diagnosed

medical condition is not a subjective criteria. These pulmonary conditions can be objectively determined.

Defendants' third argument is that the proposed classes would be as likely to contain people who sustained no injury caused by any of the defendants as they would be to contain people who had suffered damage. *Id.* p. 18. That argument is apparently based on the class not having geographical boundaries. *Id.* p. 23. Plaintiffs state they are amenable to amending the class definition to specify those areas that the evidence indicates are impacted by the farmer's smoke and populated by class members, which include Bonner, Benewah, Boundary, Kootenai and Spokane counties. That further limitation addresses that concern.

At oral argument, defendants attorney Mr. Fried, presented another argument that the minor class cannot be certified due to a lack of standing as property owners. No case law was cited for this proposition. Such argument ignores the strict liability cause of action. As to the nuisance cause of action, IDJI 491 indicates that an ownership interest in land is not needed, as a plaintiff's use and enjoyment of life" is sufficient. As to the trespass and nuisance causes of action, the reasons set forth *supra* in footnotes 1 and 2 and this Court's Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, pp. 10-27 apply.

Finally, at oral argument defendants argued at length that none of the 39 cases plaintiffs cited dealt with trespass or nuisance cases and most dealt with single point source pollution cases in a smaller geographic area. This Court's duty at this point is to "rigorously analyze" Rule 23 and the

facts of this case and the law. This Court's duty is not to find a case identical to the present case and then follow it. As plaintiffs' counsel pointed out in oral argument, one reason there may be no similar case is because there maybe no other situation where defendants have allegedly polluted as widely as the defendants are alleged to have polluted here. While this is not a single point source pollution case, the sources of pollution from grass field burning are known, as well as the date, time of burn and number of acres burned per each source. Thus, on a given day, all sources of grass field smoke are known.

B. ANALYSIS UNDER I.R.C.P. 23(a).

The. failure to establish any one of the four elements of Rule 23(a) will completely defeat a motion for class certification. *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.2d 147, 181 (3rd Cir. 2001). Rule 23(a) states that:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

The first requirement is that the class be so numerous that the joinder of all members is impracticable. This is

known as the ***numerosity*** requirement. In support of the numerosity requirement, plaintiffs cite to a magazine article in US News & World Report which estimates the class is as large as 14,000. That estimate is the number of people in the area who are impacted by field burning who suffer from one of the above physical ailments. Dr. Strimas testified he has thousands of patients in the class area and Dr. McCarthy has 32 cystic fibrosis patients and thousands of asthma patients in north Idaho. McCarthy Affdavit, ¶2, Ex. 3 to Walton Affidavit: "Where the exact size of the class in unknown but general knowledge and common sense indicate that it is large, the numerosity requirement is satisfied." *Orantes-Hernandez v Smith*, 541 F.Supp. 351, 370 (C.D.Cal. 1982). As a matter of common sense, plaintiffs have met the numerosity requirement, which is presumed at the 40-member level. *General Tel. Co. v. E.E.O.C.*, 446 U.S. 318, 330 (1980). The "numerosity" requirement of I.R.C.P. 23(a)(1) has been met.

The second requirement of Rule 23(a) is that there be questions of law or fact common to the class. This is known as the ***commonality*** requirement. The commonality requirement is not demanding, and is "permissively" construed. *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1019 (9th Cir. 1998). "Commonality" requires that class members share ***just one*** common question of law ***or*** fact. *Hash v. United States*, 2000 U.S. Dist. Lexis 20061, *20 (Idaho July 7, 2000). From the plaintiffs' complaint, it is obvious that nuisance, trespass and strict liability are the common questions of law applicable to all defendants and plaintiffs. As for the facts, the defendants' behavior (burning their fields) is common to all defendants, although the days those fields were burned varies, and where the smoke went varies.

Appendix C

Issues of fact are considered common where the injuries alleged stem from a uniform to course of conduct. *Blackie v. Barrack*, 524 F.2d 891 902 (9th Cir. 1975). Differerences in the impact of this conduct on individual class members, and other individual differences such as damages, do not defeat class certification. *Id.*, at 902-04; *Hanlon* 150 F.3d at 1019. The impact on the plaintiffs generally is common to all plaintiffs who suffer from pulmonary problems, but the exact impact obviously varies. Accordingly, the determination of damages may vary among the plaintiffs. Because defendants' underlying behavior alleged in the complaint is uniform to all plaintiffs, and because plaintiffs all have similar liability questions, the Court finds the second prong of Rule 23 (a) is met. Defendants once again attack the validity of the nuisance and trespass causes of action on the basis that these causes of action cannot be used when personal injury is being alleged, as opposed to injury to the res. First of all, that argument ignores strict liability, and strict liability alone would satisfy the commonality requirement. Second, this Court has already discussed those issues as they pertain to nuisance and trespass. Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, p. 18-27. With nuisance, personal injury may suffice and there is no requirement of injury to the res. Memorandum Opinion and Order Denying Defendants' Motions to Dismiss; pp. 10-18. While there are cases going both ways[1], our sister states of

1. *Mock v. Potlatch*, 796 F.Supp. 1545, 1549 (D.Idaho 1992) held that at least in "intangible invasion" cases [smoke, noise etc.], the plaintiff claiming trespass must prove that the intangible invasion resulted in substantial damages to the plaintiffs land.

Oregon and Washington[2], have addressed smoke, microscopic and invisible pollution, and found trespass to apply. *Ream v. Keen*, 112 Or.App. 197, 828 P.2d 1038,1039-41 (Or.App. 1992), affirmed by the Oregon Supreme Court, 314 Or. 370, 838 P.2d 1073 (1992) made it clear that if one's "possessory interest" in one's, hand is interfered with, trespass may lie, citing *Martin et ux v. Reynolds Metals Co.*, 221 Or. 86, 95, 342 P.2d 790 (1959), *cert. den.* 362 U.S. 918, 80 S.Ct. 672, 4 L.Ed.2d 739 (1960). "The requirement of damage to the *res* limits 'trespass by airborne pollutants' to cases in which there has occurred an injury that actually interferes with the **right to possession**." *Bradley v. American Smelting & Refining Co.*, 635 F.Supp. 1154, 1157 (W.D.Wash. 1986); *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 684, 709 P.2d 782, 786 (1985). This Court has already noted that plaintiffs "...have alleged substantial damages (health problems, inability to breathe, needing to move away from their home)." Memorandum Opinion and Order Denying Defendants' Motions to Dismiss, p. 20. The "commonality" requirement of I.R.C.P. 23(a)(2) has been met.

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2. *Ream v. Keen*, 314 Or. 370, 838 P.2d 1073 (1992), the Oregon Court of Appeals held that the smoke from field burning trespassed by drifing over plaintiffs' property. 314 Or. at 372-73. In *Koos v. Roth*, 293 Or. 670, 690, 652 P.2d 1255 (1982), the Supreme Court of Oregon found that trespass resulted from the farmer's field burning. The Supreme Court of Oregon in *Davis v. Georgia-Pacific Corp.*, 251 Or. 239, 242-43, 445 P.2d 481 (1968) found airborne particles from a pulp mill constituted trespass even if invisible. In *Bradley v. American Smelting & Refining Co.*, 104 Wn.2d 677, 709 P.2d 782 (1985) the Supreme Court of Washington held that airborne chemical substances from a smelter was a trespass upon plaintiffs' land.

Appendix C

The third requirement of Rule 23(a) is that the claims or defenses of the representative parties be typical of the claims or defenses of the class. This is known as the ***typicality*** requirement. Like commonality, the test for typicality is not demanding. *Mullen v. Treasure Chest Casino, L.L.C.,* 186 F.3d 620, 625 (5th Cir. 1999). The test of typicality does not refer. to the "relief sought" or the specific facts from which the claim arose, but instead refers to the "nature of the claim" asserted by the class representatives. *Weomberger v. Thornton*, 114 F.R.D. 599, 603 (S.D. Cal. 1986). On the surface it would seem that plaintiffs meet this requirement due to the identical nature of the claims against defendants i.e. nuisance, trespass, and strict liability. The "test of typicality is whether other members have the same **or similar injury**, whether the action is based on conduct which is not unique to the named plaintiffs, and whether other class members have been injured by the same course of conduct." *Hanon v. Dataproducts Corp.,* 976 F.2d 497, 508 (9th Cir. 1992) (emphasis added); *Hash v. United States*, 2000 U.S. Dist. Lexis 20061, *22 (D.Idaho July 7, 2000). Defendants argue the class representatives do not necessarily represent all of the potential class members. For example, a potential class member might be located in an area where it would be physically impossible for smoke emanating from one defendant, who has affected the class representative, to simultaneously reach that. particular potential class member. Defendants argue this raises questions about the reach of joint and several liability in Idaho, and it raises the issue of standing. *Angel Music Inc. v. ABC Sports, Inc.*, 112 F.R.D. 70, 74 (1986) (holding that a plaintiff may not use the procedural device of a class action to bootstrap himself into standing he lacks under the express terms of the substantive

law). Defendants' Joint Memorandum in Opposition to Motion for Class Certification, pp. 24-29. The Court need not decide those issues at present, as there are sufficient other indicia of typicality. Additionally, plaintiffs are amenable to limiting the geographic scope of the class action to Bonner, Benewah, Boundary, Kootenai, and Spokane counties (Plaintiffs' Reply in Support of Class Certification, p. 14), which addresses at least in part these two issues raised by defendants. Most importantly, plaintiffs have submitted evidence that defendants' smoke goes everywhere and has impacted the specific counties covered by the class. Skelton Affidavit, Exhibit 5 to Walton Affidavit. Dan Redline has testified there is no way Preliminary Injunction Tr., August 9, 2002, at p. 240 Ll. 15-22. It is important to note that plaintiffs' claim is that exposure to defendants' smoke aggravates the underlying disease in these people in these two classes, and that while the degree of aggravation may vary from person to person, "... **there is no threshold dose below which the exposure is safe**." Plaintiffs' Reply in Support of Class Certification, pp. 36-37; McCarthy Affidavit, ¶ 6, Exhibit 3 to Walton Affidavit. Plaintiffs' argument is that it is the exposure to the smoke that proves plaintiffs' and the class members' claims, that "...each glass member is injured in exactly the same way upon their exposure to the farmers' smoke in that the **exposure** triggers an unwanted, adverse, and uninvited biologic response that causes all class members discomfort and invades their right to exclusively use their homes." Plaintiffs' Reply in Support of Class Certification p. 37. The Court arees with plaintiffs' statement that "The question then relating to typcality is whether the plaintiffs' claims are typical of other people in the class ***once exposed to the farmers' smoke***, which is a

common fact to the entire class." Plaintiffs' Reply in Support of Class Certification, p. 29. "Here, both the representative plaintiffs and absent class members would assert the same claims (nuisance, trespass, strict liability) against the same defendants for their same conduct," *Id.* "The typicality requirement is intended to preclude certification of those cases where the legal theories conflict with those of the absentees." *Reilly v. Gould, Inc.*, 965 F.Supp. 588, 598 (M.D. Pa. 1997), quoting *Georgine v. Amchem Prods.*, 83 F.2d 610, 631 (3rd Cir. 1996). In the present case, the Court simply cannot see how the legal theories of the named representatives would conflict with the legal theories of the absent class members. The "typicality" requirement of I.R.C.P. 23(a)(3) has been met.

Finally, plaintiffs must show that the representative parties will fairly and adequately protect the interests of the class. This is known as the ***adequacy of representation*** requirement. Defendants point out that not all of the class representatives are seeking the same remedy, as some wish to receive monetary damages, while others want a permanent injunction. Defendants argument is that if the class representatives are not unified in their prosecution of the case, potential class members will be prejudiced. This argument was summarily rejected in *Olden v. Lafarge Corp.*, 203 F.R.D. 254, 270 (E.D. Mich. 2001). In making this argument, other courts have noted that the defendants are biased in looking out for the best interests of the potential class members. As plaintiffs pointed out:

> [I]t is often the defendant, preferring not to be successfully sued by anyone, who supposedly

> undertakes to assist the court in determining whether a putative class should be certified. When it comes, for instance, to determining whether "the representative parties will fairly and adequately protect the interests of the class," or the plaintiffs' ability to finance the litigation, it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Eggleston v.. Chicago Journeymen Plumbers' Local Union 130, 657 F.2d 890, 895 (7th Cir. 1981). The argument that this Court should conclude that absent. class members seeking damage claims cannot be represented by those seeking only injunctive relief (Defendants' Joint Memorandum in Opposition to Motion for Class Certification, p. 34) fails for at least two reasons. First, plaintiffs' complaint cannot be read such that any named representative seeks *only* injunctive relief. At most, some plaintiffs have indicated in their depositions they would prefer to see burning stop over actual or punitive damages and that they are not interested in seeking punitive damages; but not that they are precluding themselves from monetary damages. Defendants' Joint Memorandum in Opposition to Motion for Class Certification; p. 33. Second, there are cases filed where only monetary damages are being sought to the exclusion of injunctive relief. See *Kelly A. McAnally et al. v. Anderson Farms et al.*, Kootenai Co. Case CV 97-5634, where plaintiff claims that smoke, from grass field burning caused injury and monetary damages are sought. To date, plaintiffs in the present case have vigorously prosecuted this case on all claims and all issues. Plaintiffs' counsel seems

competent and experienced in this type of litigation. The adequacy of representation requirement of I.R.C.P. 23(a)(4) has been met.

C. ANALYSIS UNDER I.R.C.P. 23(b).

Once Rule 23(a) is satisfied, plaintiffs must meet one prong of the Rule 23(b) analysis in order to certify the class. Rule 23(b) reads:

> An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:
>
> (1) the prosecution of separate actions by or against individual members of the clues would create a risk of
>
> (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or
>
> (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or
>
> (2) the party opposing the class has acted or refused to act on grounds generally applicable to

the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole;

or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

In order for plaintiffs to certify the class under **I.R.C.P. 23(b)(1)(A)** they must show that separate adjudications against the defendants would result in incompatible standards of conduct for defendants to follow. Rule 23(b)(1)(A) was designed for the benefit of defendants to avoid the situation where "inconsistent judgments in separate suits would place the party opposing the class in the position of being unable to comply with one judgment without violating the terms of another judgment." *Hallaba v. World Com Network Services, Inc.*, 196 F.R.D: 630, 643 (N.D.Okla. 2000) (quoting 5

MOORE'S FEDERAL PRACTICE § 23.41[2][a]). Although defendants argue that they can simply follow the most restrictive ruling (if two district courts placed different restrictions on burning), plaintiffs counter that this specter of one district court finding burning is acceptable and another banning burning, is exactly the type of situation Rule 23(b)(1)(A) was designed to remedy. This Court agrees. The situation where one district court finds that field burning is acceptable while another decides to ban field burning is precisely the type of situation for which Rule 23(b)(1)(A) was designed. Even the scenario in defendants' argument, where the defendants could comply with two district courts' imposition of different restrictions on burning by complying with the most restrictive, presents problems which I.R.C.P. 23(b)(1)(A) was designed to address. One court might require stubble be baled before burning, another might require unlimited acres be burned but only on a few days. Even with defendants' proposed scenario, class certification is appropriate under I.R.C.P. 23(b)(1)(A).

Having found that I.R.C.P. 23(b)(1)(A) is satisfied might end the inquiry, as only one prong of Rule 23(b) must be met. However, the Court is mindful of the mandate that "A court must conduct a 'rigorous analysis' of Rule 23 before certification." *General Tel. Co. v. Falcon*, 457 U.S. 147, 161 (1982).

The next potential Rule 23(b) prong which was briefed extensively which this Court must analyze is **I.R.C.P. 23(b)(2)**. Under I.R.C.P. 23(b)(2) class. certification is appropriate where the remedy sought is injunctive relief. Controversy arises over whether injunctive relief is the

predominant remedy being sought in this case, or if instead, monetary damages form a major part of the overall remedy, and whether class certification is needed due to the overall effect an injunction would have on all plaintiffs. Different circuit courts have adopted different standards in addressing the problem of monetary damages being sought along with an injunction per Rule 23(b)(2). The Second Circuit Court of Appeals has stated that:

> "The district court may allow (b)(2) certification if it finds in its "informed, sound judicial discretion" that (1) "the positive weight or value [to the plaintiffs] of the injunctive relief or declaratory relief sought is predominant even though compensatory or punitive damages are also claimed," and (2) class treatment would be efficient and manageable, thereby achieving an appreciable measure of judicial economy."

Robinson v. Metropolitan North Commuter R.R., 267 F.3d 147, 164 (2nd Cir. 2001), *cert. denied*, 535 U.S. 951 (2002). In contrast, the Fifth Circuit Court of Appeals. has stated that certification pursuant to Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or **predominately** to money damages." *Allison v. Citgo*, 151 F.3d 402, 411 (5th Cir. 1998) (emphasis in original), citing Advisory Committee Notes to Rule 23(b)(2). Defendants argue that an injunction is not "needed" or necessary because any injunction in favor of any plaintiff would necessarily benefit the entire class. Defendants' Joint Memorandum in Opposition to Motion for Class Certification, p. 38, citing *Calderon v. Madigan*, 831 F.Supp. 1484, 1489 (D.Idaho 1992); *Snake River Farmers' Assn. V.*

Dept. of Labor, 1991 WL 539566. at *4 (D. Idaho 1991). First, defendants' argument that you don't need a class because if you get an injunction for one plaintiff the injunction is good for everyone, ignores the very reason I.R.C.P. 23(b)(2) was created. The reason.I.R.C.P. 23(b)(2) exists is for cases where injunctive relief is sought. So defendants argument that you don't need a class because an injunction obtained by one plaintiff is good for everyone, could be made in every case in which injunctive relief is sought, thus, the argument swallows up I.R.C.P. 23(b)(2). Second from a legal standpoint, the. "need" requirement is suspect. NEWBERG ON CLASS ACTIONS § 4:19 at p. 136 (4th Ed. 2002), and the cases cited at Plaintiffs' Reply in Support of Class Certification, pp. 43-46. Third, both of those Idaho cases deal with a government agency, where an order running in favor of one, would inure to the benefit of all similarly situated individuals. From a factual standpoint, as to defendants' claim that injunctive relief can be granted without class certification, the plaintiffs reply:that .if injunctive relief is granted to a number of plaintiffs individually, that does not necessarily mean the injunction will always be in place for non-named plaintiffs. For example, the named plaintiffs could move from the area or they could individually settle with defendants, either circumstance leaving no injunction in place for other non-plaintiffs who suffer from field burning. This case certainly seems to have injunction relief as the "predominate" relief sought. That was clear from the inception of the case and remains at present. Defendants cite *Allison v Citgo Petroleum Corp.*, 151 F.3d 402, 411 (5th Cir. 1998) on this issue. Defendants' Joint Memorandum in Opposition to Motion for Class Certification, p. 39. Plaintiffs cite several cases showing *Allison* has been rejected by a number of courts. Plaintiffs'

Reply in Support of Class Certification, pp. 46-48. Finally, defendants' argument that plaintiffs seek predominantly monetary damages under *Allison* (Defendants' Joint Memorandum in Opposition to Motion for Class Certification. p. 39) is directly opposite and contrary to defendants' argument that the class representatives seek only injunctive relief. *Id.* p. 33-34, citing *MBTE*, 209 F.R.D. 323 at 339-40 (S.D.N.Y. 2002).

The last prong of Rule 23(b) certification is **I.R.C.P. 23(b)(3)**, which allows certification of the class if the court finds "common questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy." Defendants focus on the liability part of the equation and argue that individual questions predominate over class questions, and that questions of individual liability will take up the bulk of the litigation. Defendants further argue that mini trials on the issue of damages would be unwieldy and extensive, and thus class action is not the superior method for resolving the controversy. Plaintiffs counter that the common questions of fact and law are (1) nuisance (2) trespass, and (3) strict liability, and the only individual questions are those of whether individual plaintiffs have been damaged, and that the damage issue can be separated from the question of liability and tried separately, The key word is **predominate**. Idaho Rule of Civil Procedure 23(b)(3) allows certification where the "common questions of law or fact common to the members of the class **predominate** over any questions affecting only individual members...". This Court finds that

there are common questions of law and fact that predominate over questions that affect only individual members. The location of the field that is burned, the location of the injured plaintiff and the duration of exposure certainly differ, but for purposes of this analysis, this is a difference without distinction. There are allegations made by plaintiffs that as to the class members as defined (adults/children who have medically diagnosed inflammatory, air ways disease, or cystic. fibrosis or chronic heart disease), they are injured upon exposure to the smoke no matter the extent of the duration. Dr. Strimas has stated "when exposed to smoke from grass field burning, that exposure aggravates all of my asthma patients' existing pulmonary disease" Strimas Affidavit, ¶ 3, Exhibit 10 to Walton Affidavit. The plaintiffs have submitted testimony of Dr. McCarthy, rebutting defendants expert Dr. Bardana: "Again, because the medical problem here is one of aggravation and not determining a causal connection between the smoke and the underlying disease, the kind of individualized assessment that Dr. Bardana proposes is clinically unnecessary." McCarthy Affidavit, ¶ 6, 14-17, Exhibit 3 to Walton Affidavit. **The key distinction in this case is that plaintiffs do not claim that defendants' smoke *causes* asthma or cystic fibrosis. Instead, plaintiffs claim that defendants' smoke *aggravates* their asthma, aggravates their cystic fibrosis, and causes injury and damage**, and to that extent the common issues predominate: "Causation" in this case is that the smoke causes aggravation of the plaintiffs' health conditions. This distinction results in "causation" being a common issue, along with liability (nuisance, trespass and strict liability) being a common issue. Those common issues of law and fact are what distinguish this case from *Pope v. Intermountain Gas Co.*, 646 P.2d 988

(Idaho 1982). The **extent** of that aggravation relates to the issue of "damages", and that extent of aggravation and damage will vary from person to person. If at a later point in time the Court concludes that some individual issues predominate, the Court can certainly bifurcate the issues of liability and damages. *Parker v. Time Warner Entertainment Co.*, 198 F.R.D. 374, 377 (E.D.N.Y. 2001); *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988). Variations in the amount of damage do not defeat class certification. *Bertulli v. Indep. Ass'n of Cont'l Pilots*, 242 F.3d 290, 298 (5th Cir. 2001).

Class action is the superior method of handling these claims of these plaintiffs and others in the area similarly situated. Common issues of fact and law predominate. The named plaintiffs can fairly and adequately represent those absent class members.

III. ORDER

The Court, after having considered the pleadings, files and other evidence in the record, the respective memoranda and arguments of the parties and their counsel, and good cause appearing therefore, finds as follows:

1. The two-classes are defined as:

    (1) All children with a medically diagnosed inflammatory air ways disease including, but not limited to, asthma, sinusitis, emphysema, chronic obstructive pulmonary

disease, and chronic bronchitis; or cystic fibrosis; or chronic heart disease, and who presently live in or within the last 3 years have lived in any region impacted by defendants' smoke, and who live in Bonner, Benewah, Boundary, Kootenai or Spokane counties.

(2) All non-minor individuals with a medically diagnosed inflammatory air ways disease including, but not limited to, asthma, sinusitis, emphysema, chronic obstructive pulmonary disease and chronic bronchitis; or, cystic fibrosis; or chronic heart disease, and who presently live in or within the last 3 years have lived in any region impacted by defendants' smoke, Bonner, Benewah, Boundary, Kootenai and Spokane counties.

2. Because the classes include many different persons, the class members are so numerous that joinder of all members is impractical.

3. The following questions of law and fact are common to the classes: From the plaintiffs' complaint, nuisance, trespass and strict liability are the common questions of law applicable to all defendants and plaintiffs. As for the facts,

the defendants' behavior (burning their fields) is common to all defendants, although the days those fields were burned varies, and where the smoke goes varies. Issues of fact are considered common where the injuries alleged stem from a uniform course of conduct. *Blackie v. Barrack*, 524 F.2d 891, 902 (9th Cir. 1975). Differences in the impact of this conduct on individual class members, and other individual differences such as damages, do not defeat class certification. *Id.*, at 902-04; *Hanlon* 150 F.3d at 1019.

4. Plaintiffs' claims raise the questions of law and fact listed in paragraph 3 and are typical of the clams of the classes.

5. Plaintiffs' through their counsel of record, will fairly and adequately protect the interests of the class.

6. Given that the same legal and factual issues are common to the class, individual lawsuits by individuals with those described pliysieal conditions living in those described counties, would either risk inconsistent adjudication or would as a practical matter, be dispositive of the interests of other persons so situated.

7. The defendants' actions regarding burning of grass seed stubble apply generally to the classes, and any injunctive or declaratory or injunctive relief would be applicable to the classes as a whole, and monetary damages generally maybe applicable to the classes as a whole, and the issue of individual damages may be bifurcated from the issue of liability.

8. The questions of law and fact listed in paragraph 3, which are common to the members of the classes, predominate over any questions affecting only individual members, so that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Based on the above findings, the Court orders the named plaintiffs shall serve as the representative party on behalf of the classes, and that this action shall be maintained as a class action under I.R.C.P. 23(b)(1), (2) and (3). Since I.R.C.P. 23(b)(1) and (2) are satisfied, the classes shall be mandatory, non opt-out classes. The Court reserves the right to modify this Order, or to create subclasses, for good cause, pursuant to I.R.C.P. 23.

ENTERED this 28th day of April, 2003.

s/ John T. Mitchell
John T. Mitchell, District Judge

APPENDIX D — MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION DATED AND FILED AUGUST 30, 2002

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

Case No. **CV 2002 3890**

LAWRENCE ("BUD") MOON, JR., et al.,

Plaintiffs,

vs.

NORTH IDAHO FARMERS ASSOCIATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. FACTUAL BACKGROUND.

To place matters in context, the "Factual Background" set forth in the Court's "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss" filed August 19, 2002, is reiterated in part in this Memorandum Opinion and Order Granting Plaintiffs' Motion for Preliminary Injunction as follows:

Appendix D

Plaintiffs are eight individuals who either themselves have, or who represent minor children who have, chronic pulmonary disorders such as asthma, bronchitis, cystic fibrosis and/or cardiac conditions. Class Action Complaint, ¶ 1. They allege they are at great risk for serious health problems due to smoke from the burning of grass seed stubble and straw, and are thus differentiated from the rest of the population that are exposed to such smoke. *Id.*¶ 5. Accordingly, plaintiffs are referred to as "at risk citizens", or "citizens." The defendants consist of about 78 farmers who farm on the Coeur d'Alene Indian Reservation and the Rathdrum prairie (located in Kootenai and Benewah counties), who grow grass seed and who have burned grass residue. *Id.* pp. 10-26, ¶ 23-101. They are referred to as "farmers". Defendant North Idaho Farmers Association (NIFA) is a non-profit organization whose voluntary members are Idaho farmers and corporations, including those who grow turf grasses. *Id.* p. 10, ¶ 22. Finally, the State of Idaho is a defendant. *Id.* p. 26, ¶ 102. On June 10, 2002, plaintiffs filed their "Class Action Complaint" against defendants, seeking: 1) class certification (however, certification has not been brought before the Court at this time); 2) an order from the Court creating an independently supervised medical monitoring program; 3) a preliminary and permanent injunction ordering farmers to immediately stop any agricultural burning in the State of Idaho even if such burning is in compliance with any applicable provision of the Idaho "Smoke Management Plan"; 4) a declaration that citizens' property was taken by the State of Idaho without just compensation and that *Idaho Code § 52-108* and the immunity provisions of the Right to Farm Act (I.C. § 24-4503) are unconstitutional; 5) damages for just compensation

for any taking and for future costs incurred as a result of exposure to smoke; 6) costs, attorney fees and the payment of the expenses of the medical monitoring program; and 7) "any other relief the Court deems just and equitable." *Id.* p. 55-56. As of August 30, 2002, none of the farmers have filed an answer to the Class Action Complaint.

Citizens' attorneys scheduled a two day hearing for a temporary restraining order, to be held on July 18-19, 2002. The week before that hearing was scheduled, citizens' attorneys cancelled such hearing, as one of them was traveling to England. Citizens' Motion for Temporary Restraining Order and Order to Show Cause for Issuance of Preliminary Injunction was filed on July 31, 2002.[1] Citizens' attorneys made no request to reschedule the hearing until August 1, 2002, at which time citizens' attorneys called the Court to schedule the hearing on their motion for TRO and preliminary injunction, and they were given a one day hearing on August 9, 2002.

The State of Idaho and some of the farmers[2] filed motions to dismiss on August 7, 2002. Other farmers filed their

1. Injunctive relief is not sought against defendant NIFA, and thus, the attorney for NIFA did not appear at the August 9 and 15, 2002 hearings. Affidavit of Donald J. Farley, filed August 5, 2002.

2. Various farmers are represented by various attorneys, and all have submitted pleadings. So as to avoid confusion in referencing those pleadings in this and future decisions, the groups of farmers as represented by their attorneys will be referred to as follows: McLean, Asher and Place represented by Michael E. McNichols are referred

(Cont'd)

motions to dismiss on August 8, 2002. All motions to dismiss were pursuant to *I .R.C.P. 12(b)(6)*, failure to state a claim upon which relief could be granted. None of the motions to dismiss were timely filed relative to the hearing date the farmers noticed up (*I.R.C.P.6(d)*), but in Plaintiffs' Partial Objection to Defendants' Motion to Shorten Time filed August 8, 2002, and again at hearing on August 9, 2002, Steve Berman, attorney for citizens, did not object to the Court's hearing the farmers' motions to dismiss on the issues of preemption, nuisance and trespass. The farmers motions to dismiss on the theories of strict liability, conspiracy, medical monitoring and the State of Idaho's motion to dismiss on the issues of constitutionality of the statutes and taking without just compensation, were agreed by all counsel at hearing on August 9, 2002, to be deferred to a later date. Hearing on the citizens' motion for a temporary restraining order, and motion for preliminary hearing, and the farmers' motions to dismiss as to the issues of 1) preemption, 2) nuisance and 3) trespass, were held August 9, 2002. Evidence and argument by counsel were presented. The matter was continued to another hearing held August 15, 2002, to give all parties the opportunity to submit additional briefing to the Court on the issues of trespass and nuisance.

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to as McLean et al.; Lampert Farm, Clausen, M. LaShaw, Morris, Nichols, Towne, Bloomsburg, B. LaShaw, Heaton and Sievers represented by Michael E. Ramsden are referred to as Lampert et al.; Meyer, Deshiell and others are represented by Peter Erbland, Gary H. Baise and Stewart D. Fried are referred to as Meyer et al. The plaintiff citizens are represented by Steve W. Berman, R Brent Walton, Philip H. Gordon and Karen Lindhodlt are referred to as citizens.

Appendix D

The Court will again explain why a hearing on the temporary restraining order was held. A motion for a temporary restraining order may be granted *ex parte,* without a hearing. *I.R.C.P. 65(b).* However, because many of the defendants had appeared in this case and were represented by counsel by the time the temporary restraining order was requested, and because the injunction sought encompassed so much of the controversy between the parties, an exercise of caution indicated this Court should use its discretion and conduct a hearing so the parties could present evidence and argument in addition to what had been presented by briefing. The Idaho Supreme Court in *Lawrence Warehouse Co. v. Rudio Lumber Co., 89 Idaho 389, 395, 405 P.2d 634 (1965)* indicated there should be a hearing where the injunction "encompasses the entire controversy between the parties." Any injunction in this case could encompass the "entire" controversy, or nearly the entire controversy. Justice Thomas in *Mountain States Tel. & Tel Co. v. Jones, 75 Idaho 78, 267 P.2d 634 (1954)*, wrote:

> The discretionary power vested in the court to grant injunctive relief in such cases is not an arbitrary one; it is a sound and legal discretion which should be exercised with great caution; the requirements of caution and sound legal discretion can only be had upon a full hearing; it is indeed a delicate power which requires an abundance of caution, deliberation and sound discretion based upon a full disclosure of the facts which demonstrate with reasonable certainty and persuasiveness the probability of confiscation; it cannot be exercised soundly or with caution

> without hearing all the relevant facts on the issues joined with reference to the probability of confiscation.

75 Idaho at 86, 267 P.2d at 638. Cited in *Lawrence Warehouse Co. v. Rudio Lumber Co., 89 Idaho at 395, 405 P.2d at 640.*

II. LEGAL ANALYIS OF MOTION FOR PRELIMINARY INJUNCTION.

A Temporary Restraining Order pursuant to Idaho Rule of Civil Procedure 65(b) was sought by citizens. Above, the Court explained why it was unwilling to grant such an order *ex parte,* without giving all parties an opportunity to be heard on the matter. Since a hearing has been had, there essentially can be no "Temporary Restraining Order". *See Rowland v. Kellogg Power & Water Co., 40 Idaho 216, 233 P. 869 (1925).* Accordingly, this will be analyzed as a motion for a preliminary injunction under Idaho Rule of Civil Procedure 65(e), and not a motion for temporary restraining order under Idaho Rule of Civil Procedure 65(b).

Idaho law requires every order granting an injunction shall set forth the reasons for its issuance, it shall be specific in terms, it shall describe in reasonable detail the act sought to be restrained and is binding only upon the parties to the action (their officers, agents, servants, employees and attorneys) who receive actual notice of the order by personal service or otherwise. Idaho Rule of Civil Procedure 65(d). In analyzing "the reasons for its issuance", the Court must look to the "grounds" for which a prelimnary injunction may

be granted. Those grounds are set forth in Idaho Rule of Civil Procedure 65(e):

> *Rule 65(e).* Grounds for Preliminary Injunction. A preliminary injunction may be granted in the following cases:
>
> (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the commission or continuance of the acts complained of, either for a limited period or perpetually.
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.
>
> (3) When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to render the judgment ineffectual.
>
> (4) When it appears, by affidavit, that the defendant during the pendency of the action, threatens, or is about to remove, or to dispose of the defendant's property with intent to defraud the plaintiff, an injunction order may be granted to restrain the removal or disposition.

(5) A preliminary injunction may also be granted on the motion of the defendant upon filing a counterclaim, praying for affirmative relief upon any of the grounds mentioned above in this section, subject to the same rules and provisions provided for the issuance of injunctions on behalf of the plaintiff.

(6) The district courts, in addition to the powers already possessed, shall have power to issue writs of injunction for affirmative relief having the force and effect of a writ of restitution, restoring any person or persons to the possession of any real property from the actual possession of which the person or persons may be ousted by force, or violence, or fraud, or stealth, or any combination thereof, or from which the person or persons are kept out of possession by threats whenever such possession was taken from them by entry of the adverse party on Sunday or a legal holiday, or in the nighttime, or while the party in possession was temporarily absent therefrom. The granting of such writ shall extend only to the right of possession under the facts of the case, in respect to the manner in which the possession was obtained, leaving the parties to their legal rights on all other questions the same as though no such writ had issued: provided, that no such writ shall issue except upon notice in writing to the adverse party of at least five (5) days of the time and place of making application therefor.

Obviously not all grounds enumerated in Idaho Rule of Civil Procedure 65(e) apply to the facts of the present case ((4), (5) and (6)), but the first three grounds do apply. *Harris v. Cassia County, 106 Idaho 513, 681 P.2d 988 (1984)*, provides a good analytical framework for analyzing the preliminary injunction grounds that apply to the present case.

This Court is cognizant of the fact that granting or denying injunctive relief is a matter of discretion vested in the trial court, and that such discretion is not to be abused. *Harris v. Cassia County, 106 Idaho at 517, 681 P.2d at 992 (1984)*. The court which is to exercise the discretion is the trial court and not the appellate court, and an appellate court will not interfere absent a manifest abuse of discretion. *Id., citing Milbert v. Carl Carbon, Inc., 89 Idaho 471, 406 P.2d 113 (1965)*; *Western Gas & Power of Idaho, Inc. v. Nash, 75 Idaho 327, 272 P.2d 316 (1954)*.

Each of the applicable grounds under Idaho Rule of Civil Procedure 65(e) are analyzed below.

A. IDAHO RULE OF CIVIL PROCEDURE 65(e)(1).

Idaho Rule of Civil Procedure 65(e)(1) reads:

> A preliminary injunction may be granted in the following cases:
>
> > (1) When it appears by the complaint that the plaintiff is entitled to the relief demanded, and such relief, or any part thereof, consists in restraining the

> commission or continuance of the acts complained of, either for a limited period or perpetually.

It is the "entitled to the relief demanded" feature of Idaho Rule of Civil Procedure 65(e)(1) that caused this Court to feel that the farmers' motions to dismiss needed to be decided first, before the preliminary injunction was ruled upon. In other words, it would be impossible to gauge citizens' likelihood of success without subjecting the legal basis to scrutiny through the motions to dismiss.

The "entitled to the relief demanded" language found in Idaho Rule of Civil Procedure 65(e)(1) is frequently restated as "substantial likelihood of success." The Idaho Supreme Court in *Harris* interpreted "substantial likelihood of success" as follows:

> The substantial likelihood of success necessary to demonstrate that appellants are entitled to the relief they demanded cannot exist where complex issues of law or fact exist which are not free from doubt. *First National Bank & Trust Co. v. Federal Reserve Bank, 495 F.Supp. 154 (W.D.Mich.1980)*; *Avins v. Widener College, Inc., 421 F.Supp. 858 (D.Del.1976)* (not granted where issues of fact and law are seriously disputed); *Wm. Rosen Monuments, Inc. v. Phil Madonick Monuments, Inc., 62 A.D.2d 1053, 404 N.Y.S.2d 133 (N.Y.App.Div.1978)* (granted only upon the clearest evidence). Appellants claim of right in this case is not one which is free from doubt and,

> accordingly, we hold that appellants have not carried their burden of proof under *I.R.C.P. 65(e)(1).*

106 Idaho at 518, 681 P.2d at 993. In *First National Bank & Trust Co. v. Federal Reserve Bank, 495 F.Supp. 154 (W.D.Mich.1980)*, the federal district judge wrote:

> Although it appears to the Court that Plaintiff has a likelihood of success, whether it has a "substantial likelihood" as required by Mason, supra, is, at this juncture, unclear.
>
> It is the Court's opinion that there can be no substantial likelihood of success where there exist complex issues of law, the resolution of which are not free from doubt. This is especially true when the record before the Court is incomplete.

495 F.Supp. at 157. This Court has analyzed the facts and law of the present case, and, similar to the federal district judge in Michigan, it appears to this Court that the citizens have a "likelihood of success", maybe a "good" likelihood of success, but it is not clear at this juncture that the citizens have a "substantial likelihood" of success as required by Idaho Rule of Civil Procedure 65(e)(1) and *Harris.*

Even though this Court has denied farmers' motions to dismiss,[3] the issues of law remain somewhat complex. At

3. Meyer, et al. on August 23, 2002 filed an "Augmentation of Authority in Opposition to Motion for Preliminary Injunction", citing Covington v. Jefferson County (Planning and Zoning Commission), (Cont'd)

the time of the hearings, the Court had concerns over the applicability of the legal theories advanced by plaintiffs, specifically, nuisance and trespass. The Court is convinced that the law as set forth in this Court's "Memorandum Opinion and Order Denying Defendants' Motion to Dismiss" filed August 19, 2002, is the appropriate current state of the law to be applied to nuisance and trespass. Yet there are other issues of law not thoroughly explored at this juncture which will need to be addressed in the future. Those issues of law are somewhat complex as well. For example, causation and apportionment will need to be addressed. Farmers argue that each citizen plaintiff will need to prove from which particular farmer's field the particular smoke particles came from. Citizens' counsel mentioned in argument that the citizens do not need to show which farmer's ash went in which plaintiff's lungs or over which plaintiff's land due to joint and several liability. *Idaho Code § 6-803(3)* limits joint and several liability, to three situations, found in *Idaho Code § 6-803(5), (6) and (7)*. It would seem *Idaho Code § 6-803(5) and (6)* may well apply to the smoke from field burning. *Idaho Code § 6-803(5)* reads:

> A party shall be jointly and severally liable for the fault of another person or entity or for payment of the proportionate share of another party where they were acting in concert or when a person was acting as an agent or servant of another party. As

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2002 Opinion No. 111 (Idaho Supreme Court filed August 16, 2002). This Court has reviewed that case, and finds it not controlling as this Court did not reach the issue as to whether there was a "taking" of citizens' property.

> used in this section, "acting in concert" means pursuing a common plan or design which results in the commission of an intentional or reckless tortious act.

It could be that the farmers are acting in concert. Clearly field burning is an intentional act, and since nuisance and trespass have been alleged, it is a tortuous act. *Idaho Code § 6-803(6)* reads:

> Any cause of action arising out of a violation of any state or federal law or regulation relating to hazardous or toxic waste or substances or solid waste disposal sites.

It would seem that field burning produces a hazardous substance, and it certainly is regulated. If any burn has violated those state or federal regulations, joint and several liability could attach under this section of the statute. Additionally, even if liability may be several, the burden of proof may still fall upon the farmers. *City of Benton City v. Adrian, 50 Wash.App. 330, 339, 748 P.2d 679, 685 (Ct.App.Wash.1988)*; liability may be several, but if apportionment is difficult or impossible, defendants have the burden of proving their individual contribution, not the plaintiffs.

Causation and apportionment do not need to be decided at this time. They have been briefly discussed only to illustrate the fairly complex issues of law in this case.

Appendix D

The issues of fact, at least at the present time, are not really in dispute. Clearly the farmers' burning of grass seed residue causes smoke. That smoke, causes these citizen plaintiffs to have increased medical problems, some very serious, which in turn causes some of them to hole up in their homes or to leave the area completely during the period of burning. The medical testimony by Dr. Strimas and Dr. Covelli is corroborated by the affidavits (in federal district court case number 02-0241N-EJL, admitted as evidence in the present case) of Dr. David P. York and Dr. Timothy E. Bruya (both board certified pulmonologists in the immediate area). Also, the opinion that particulate matter from agricultural field burning increases the incidence of respiratory disease and cardiac disease, has been expressed by 87 Kootenai County physicians of various specialties (Declaration of David P. York, M.D., Exhibit B), and by 28 Bonner County physicians (Declaration of Scott Burgstahler, M.D., Exhibit A). Their opinions are contradicted only by Dr. Moogavkar, a professor of epidemiology at the University of Washington, who testified there is no epidemiological or statistical evidence, based on a large population, as to the effects of field burning and health problems. But even Dr. Moogavkar admitted that "there is no doubt there are some individuals who are legitimately distressed" due to the smoke from grass field burning. That epidemiological evidence is given little weight by this Court compared to the testimony and affidavits of the physicians who actually *treat* people having respiratory problems during the field burning season. That "clinical evidence" (as opposed to epidemiological evidence) is overwhelming, and uncontradicted. However, at the present time, this Court cannot say that the citizens' case is based on "the clearest evidence", because it is still

somewhat incomplete. Again, this can be traced to the fact that the Complaint in this case was not filed until June 10, 2002. As in *First National Bank & Trust Co.*, "the record before the Court is incomplete" because citizens' medical records have only recently been disclosed to counsel for farmers at the time of the August 15, 2002 hearing. As stated above, the issues of law are somewhat complex. The matter is not "free from doubt".

The Court determines that a preliminary injunction under Idaho Rule of Civil Procedure 65(e)(1) is not allowed due to the somewhat complex legal issues, the lack of a complete record in some aspects, and because the matter is not free from doubt.

B. IDAHO RULE OF CIVIL PROCEDURE 65(e)(2).

Idaho Rule of Civil Procedure 65(e)(2) reads:

> A preliminary injunction may be granted in the following cases:
>
> (2) When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff.

The Idaho Supreme Court in *Harris* interpreted Idaho Rule of Civil Procedure 65(b)(2) requirement of "irreparable injury" as follows:

> We have previously stated that "a preliminary mandatory injunction is granted only in extreme cases where the right is very clear and it appears that irreparable injury will flow from its refusal." *Evans v. District Court of the Fifth Judicial District, 47 Idaho 267, 270, 275,* P.99, 100 (1929); *quoted in Farm Service, Inc., v. United States Steel Corp., 90 Idaho 570, 587, 414 P.2d 898, 907 (1966).* The district court's findings state that: "[t]he evidence clearly indicates that neither of the named plaintiffs nor, for that matter, any of the other proposed plaintiffs whose records were presented are in danger of any irreparable damage." We agree.

106 Idaho at 518, 681 P.2d at 988. There are two issues then to be analyzed: 1) a right that is "very clear" and 2) irreparable injury.

1. A "Very Clear" Right.

This Court determines that the statement in *Harris* that the right must be "very clear" interpreting Idaho Rule of Civil Procedure 65(e)(2) is not applicable in all instances for the following reasons. First, that statement in Harris is based on *Farm Service, Inc., v. United States Steel Corp., 90 Idaho 570, 587, 414 P.2d 898, 907 (1966),* which interpreted Idaho Code § 8- 402(2), the predecessor to Idaho Rule of Civil Procedure 65(e)(2). A reading of *Farm Service Inc.,* shows that it is only when the granting of the preliminary injunction "will have the effect of giving to the party seeking the injunction all the relief sought in the action", that the moving

party must show "a clear right to the relief sought." *Id.* A complete ban on burning as injunctive relief would have the "effect of giving to the party seeking the injunction (citizens) all (or nearly all) the relief sought in the action". If injunctive relief short of that is deemed appropriate, then, according to *Farm Service, Inc.,* there need be no showing of "a clear right to the relief sought." Second, a plain reading of Idaho Rule of Civil Procedure 65(e)(1) and (2) shows that "a clear right to relief" is not contemplated under Idaho Rule of Civil Procedure 65(e)(2), when it is required under Idaho Rule of Civil Procedure 65(e)(1), through the language "When it appears by the complaint that the plaintiff is entitled to the relief demanded ...". Idaho Rule of Civil Procedure 65(e)(2) is completely silent on this aspect, and thus, it is presumed not to be contained as an element under the ground set forth in *Rule 65(e)(2)*. As noted by the Idaho Supreme Court in *Gilpin v. Sierra Nevada Consol. Mining Co., 2 Idaho 696, 703, 23 P. 547, 549 (1890)*, (interpreting Revised Statute of Idaho Section 4288, the statutory predecessor to Idaho Code § 8-402(2), the statutory predecessor to Idaho Rule of Civil Procedure 65(e)(2)), the various grounds for granting an injunction were "disjoined in the statute from the other grounds." In other words, each ground is separate and stands alone.

This Court finds that under Idaho Rule of Civil Procedure 65(e)(2), if the injunctive relief granted does not "have the effect of giving to the party seeking the injunction all the relief sought in the action", then there is no required showing of a "very clear" right, and injunctive relief may be granted where the injury is great or irreparable.

Appendix D

2. Great or Irreparable Injury to Plaintiff.

At first glance the above quote in *Harris* might indicate that the Idaho Supreme Court felt an injunction could be granted only where the injury is irreparable. *106 Idaho at 518, 681 P.2d at 988.* But that interpretation would be out of context with Idaho Rule of Civil Procedure 65(e)(2) which reads: "When it appears by the complaint or affidavit that the commission or continuance of some act during the litigation would produce waste, or great or irreparable injury to the plaintiff." A review of other Idaho Supreme Court cases makes it clear that injunctions can be granted under Idaho Rule of Civil Procedure 65(e)(2), where the injury is "great" *or* "irreparable". As stated in *Meyer v. First Nat'l Bank, 10 Idaho 175, 181, 77 P. 334, 336 (1904)*:

> The contention of defendants that plaintiffs have an adequate remedy by an action at law, and cannot, therefore, resort to an equitable remedy, is not well founded. It is true that they have their remedy for damages, but under our statute, section 4288, Revised Statutes, a party is not under the necessity of waiting till his property has been damaged and destroyed, and his business disorganized, and his premises encroached upon to the extent of his own ouster, and then resorting to an action at law for redress. In *Staples v. Rossi, 7 Idaho, 618, 65 Pac. 67 [1901],* this court laid down the rule under our statute as follows: "Injunctions will issue to restrain temporarily an act which will result in great damage to the plaintiff, although the injury is not irreparable, and

> notwithstanding that other remedies lie in behalf of plaintiff."

The last sentence in the above quote makes it clear that "Injunctions will issue to restrain temporarily an act which will result in great damage to plaintiff", even though the injury is not irreparable and even though damages may later compensate the injured party for that injury. (emphasis added). The testimony is essentially uncontroverted that these citizens have suffered great damage in the past. Not being able to breathe and needing steroidal drugs to breathe, are events of great damage. If these citizens, with their predispositions are exposed again to these levels of smoke, it "will result in great damage" to these citizens. The argument can be made by farmers that the smoke might not blow the direction of these citizens this year. However, if the smoke does blow in their direction, in concentrations experienced in the past, there will be great damage. The wind speed and direction is something no party to this case may control. Thus, while there may be a statistical probability that the smoke this year *will not* blow in the direction of any one of these citizens, there is also a statistical probability that it *will* blow in the direction of one of them, and if it does, "great damage" will occur. The testimony was that the damage is irreparable. Dr. Covelli, a pulmonary critical care specialist, testified that his respiratory patients are affected by grass burning, and his opinion to a degree of medical certainty is that field burning is a trigger, even when only exposed for a few minutes. He testified that people are dying in emergency rooms from that exposure, that one person died from exposure to smoke that was from a field burning across the street. He testified that heart attacks increase with increased exposure

to particulate matter. Dr. Covelli testified that steroids are used to treat chronic lung inflammation, and that there are long term consequences with steroid use, especially with children (eye damage, bone damage, skin damage and muscle damage).

In addition to being "great" injury, the injury is also "irreparable" for the same reasons noted above. There can be no more "irreparable" injury than death, and even the less severe consequences of steroid treatments are "irreparable". Furthermore, other courts have declared field burning to cause irreparable injury. In *Save Our Summers et al., v. Washington, 132 F.Supp.2d 896, 905 (E.D.Wash.1999)*, Judge Whaley found "The risk of physical injury from continued field burning is sufficient to establish a risk of irreparable harm." That is a case originating 27 miles away. In a case more distant geographically, irreparable injury was found in *Heather K. v. City of Mallard, 887 F.Supp. 1249, 1260 (N.D.Iowa 1995)*, when the court stated: "continued open burning poses a very real health threat, possibly even a mortal threat, to Heather K ."

Using either word from Idaho Rule of Civil Procedure 65(e)(2), the injury proven to these citizens is both "great" and "irreparable".

In *Schreck v. Village of Coeur d'Alene, 12 Idaho 708, 87 P. 1001 (1906)*, the Idaho Supreme Court held that where the complaint and affidavits for an injunction against a city alleged a nuisance especially injurious to the plaintiff (a city maintained a dumping ground for all kinds of waste, which emitted offensive odors, endangering the health and comfort

of plaintiff and his family, and depreciating the value of his property and rendering his premises unsafe for habitation), and the city did not deny the existence of the nuisance but instead alleged that it has taken steps to abate it intended to prevent any more occurrences, but the proof was that conditions had not materially changed, then *it was error for the district court to deny a temporary injunction,* and the Supreme Court remanded back to the district court with instructions to grant a temporary injunction. The facts in the present case are different, but analogous. Citizens have proven the smoke from field burning "endangers the health" of themselves and their family members, and they have proven the smoke "renders their premises unsafe for habitation" during periods when grass field smoke is present. Farmers certainly have not admitted a nuisance, which was admitted in *Schreck.* However, farmers cannot really deny their field burning smoke is a "nuisance" in the *common usage* of the word. Instead, farmers argued their field burning smoke could not constitute a "nuisance" as that word is *legally* defined. However, farmers have not prevailed on that legal argument, as set forth in this Court's "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss." Farmers also argue the new regulations this year will in essence "abate" the nuisance. But if even with those new regulations, if the respiratory problems persist, then we are in a fact situation very analogous to *Schreck* . Keep in mind the Idaho Supreme Court stated that in such a situation, it would be error not to grant an injunction.

As grass growing farmer Wayne Meyer testified at the hearing on August 9, 2002: "If my daughter had cystic fibrosis I'd move." If viewed that way, that all of these citizens with

respiratory problems could simply move away from here, then their injury is not "irreparable." Even though they would be leaving behind their home, their jobs, their loved ones, they can still move away from the problem, using Wayne Meyer's remedy. But under Idaho law, "irreparable injury" is only half of the question. The other half of the question is whether such a move would be "great injury". This Court finds as a matter of law, such a move would be "great injury".

The farmers could argue that the citizens could simply move away during the two month burn period. That would still be "great injury", to be forced with the Hobson's choice of staying at your home and risking health problems, or moving away from your family, job, school and home. What if a citizen guessed wrong, and stayed hoping the smoke wouldn't come their direction this year? If they guess wrong, and don't get out in time they could suffer irreparable and great injury, or death, the ultimate irreparable injury.

This Court finds as a factual matter, and as a matter of law, that the requirements of Idaho Rule of Civil Procedure 65(e)(2) have been met, and that an injunction should issue. For the reason discussed above, such an injunction cannot "have the effect of giving to the party seeking the injunction all the relief sought in the action". That requirement has been met, as the detailed "Specific Terms of the Preliminary Injunction" are discussed below.

3. Public Interest.

While the "public interest" is not a factor enumerated in Idaho Rule of Civil Procedure 65(e), it is a factor which should be discussed. Since the "public interest" apparently

has not been expressly[4] adopted by the Idaho Supreme Court as a factor under Idaho Rule of Civil Procedure 65(e), the "public interest" has not been considered by the Court in reaching its decision to grant the preliminary injunction. If the "public interest" were a criteria under Idaho Rule of Civil Procedure 65(e), it would be satisfied under the facts of this case.

First National Bank & Trust Co., supra, cited with approval in the Idaho Supreme Court's decision in *Harris, supra,* discussed public interest. *495 F.Supp. 154 at 157-158.* 11A *Wright, Miller & Kane, Federal Practice and Procedure 2d § 2948.4 (2002)* states:

> The final major factor bearing on the court's discretion to issue or deny a preliminary injunction is the public interest. Focussing [sic] on this factor is another way of inquiring whether there are policy considerations that bear on whether the order should issue. It frequently has been emphasized that whether the public interest either might be furthered or might be injured by an injunction should be given considerable weight.

Id. at pp. 200-205. In the present case, this Court can see no injury to any public interest by granting an injunction. If an injunction were to be granted, the injury would be limited to

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4. The argument could be made the Idaho Supreme Court has "implicitly" adopted the "public interest" criteria, as the Idaho Supreme Court in Harris cited with approval *First National Bank & Trust Co. v. Federal Reserve Bank*, 495 F.Supp. 154 (W.D.Mich.1980), which did discuss "public interest".

the farmers that are parties to this lawsuit, not the public at large. The Court can see great public interest being furthered by an injunction being granted. Other than the farmers who "want" burning due to their own economic interests, the Court can conceive of no other segment of the public that "want" field burning to occur.

A federal district judge sitting 27 miles away from Coeur d'Alene, has already reviewed extensive evidence as well, and come to the same conclusion regarding the public interest. United States District Judge Robert H. Whaley, sitting in Spokane, Washington (Eastern District) on September 14, 2000, issued his decision in *Save Our Summers et al., v. Washington, 132 F.Supp.2d 896 (2000)*. Judge Whaley stated: "Furthermore, the public interest in preserving health and safety favors issuance of a temporary restraining order. There is significant evidence in the record that agricultural burning may pose a significant threat to public health." *132 F.Supp.2d at 909*.

Dr. David York, a pulmonologist in Coeur d'Alene stated "It is my opinion, to a reasonable degree of medical certainty, that exposure to fine particulate matter pollution from grass field residue burning is a significant heatlh problem for people in North Idaho." Declaration of Dr. David P. York, p. 2, ¶ 3.

For all the above reasons, if the "public interest" were a criteria under Idaho Rule of Civil Procedure 65(e), it would be satisfied under the facts of this case.

Appendix D

C. IDAHO RULE OF CIVIL PROCEDURE 65(e)(3).

Idaho Rule of Civil Procedure 65(e)(3) allows a preliminary injunction: "When it appears during the litigation that the defendant is doing, or threatens, or is about to do, or is procuring or suffering to be done, some act in violation of the plaintiff's rights, respecting the subject of the action, and tending to make the judgment ineffectual." Citizens simply argue: "Moreover, the failure to enjoin defendants burning would render ineffectual the potential judgment", without stating why. Plaintiffs' Motion for Temporary Restraining Order, p. 20. Additional argument was made at pages 23-25, but those arguments did not really address the language of Idaho Rule of Civil Procedure 65(e)(3). Idaho Rule of Civil Procedure 65(e)(3) appears to have been interpreted by the Idaho Supreme Court only once in *Gilpin v. Sierra Nevada Consol. Mining Co., 2 Idaho 696, 703, 23 P. 547, 549 (1890).* That case dealt with whether an injunction regarding a mine in Shoshone County should have been denied by the district court. The Idaho Supreme Court held: "To remove the ore from the mine, and leave but a worthless shell to be contended for, would certainly have a 'tendency to render ineffectual' any judgment which the plaintiff might recover." *Id.* In the present case, an analogous situation exists. If further damage occurs to these citizens, either through degradation in health, shortening of life, the permanent effect of steroid use, or needing to move away for weeks at a time each year, it would have a "tendency to render ineffectual" any judgment they may recover, because a money judgment cannot restore health, cannot restore life expectancy, cannot repair permanent damage to the body and cannot restore time spent away from the home. It should be noted that in *Gilpin* the

Appendix D

Idaho Supreme Court reversed the district court's denial of a preliminary injunction, and itself ordered a preliminary injunction, not even remanding the issue back to the trial court. *23 P. at 552.*

This Court finds as a factual matter, and as a matter of law, that the requirements of Idaho Rule of Civil Procedure 65(e)(3) have been met, and that an injunction should issue upon that ground as well. The requirement of Idaho Rule of Civil Procedure 65(e)(2) that an injunction cannot "have the effect of giving to the party seeking the injunction all the relief sought in the action" does not apply to Idaho Rule of Civil Procedure 65(e)(3). A complete injunction banning all burning could, theoretically, issue under this ground. The Court declines to do so for the following reasons. First, the class has not been certified. At the present time we are concerned with eight citizens, and the remedy below addresses their concerns for this burning season. It is not up to the Court to get the class certified, it is up to the plaintiffs, the citizens. Second, this lawsuit is in its infancy as the Complaint was only filed June 10, 2002, and heard by this Court August 9 and 15, 2002. There is an overwhelming amount of material and case law which has been read. It may be that if there were more testimony and exhibits, for example further development of the medical record, a complete injunction may be appropriate. On the other hand, depending on the nature of that evidence, it may be that no injunction is appropriate. Based on the present state of the evidence (but recognizing there is more evidence to come at trial), the terms of the injunction set forth below are appropriate. A complete

injunction, *at the present time,*[5] is not appropriate. Third, the burn season is half over. Again, that is a function of when the citizens filed their Complaint. This Court has done everything in its ability to digest the volume of information presented, and render an informed decision as soon as humanly possible. Fourth, if the practice of baling before burning is as effective as estimated, the injury to these citizens should be lessened as the particulate matter should be greatly reduced. Also, there is an alternative available in the injunctive relief terms should the citizens not want to remain in the area while burning after baling takes place.

III. SPECIFIC TERMS OF THE PRELIMINARY INJUNCTION.

The act sought to be restrained is preventing particulate matter from grass field burning from these defendant farmers from reaching levels which, while perhaps below regulated levels, are still hazardous to the health of these citizen plaintiffs.

Farmers are enjoined from further filed burning for the remainder of year 2002 unless they comply with the following terms and conditions:

1. Before any further burning occurs, every farmer who is a party to this case shall bale all loose straw and other

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5. An injunction is an equitable remedy issued under established principles that guide courts of equity, and the court retains the power to modify the terms of its injunction in the event that changed circumstances require it. *Pacific Rivers Council v. Thomas*, 936 F.Supp. 738 (D.Idaho 1996).

residue from the ground. Prior to any additional field being burned, the Smoke Management Coordinator (for land within Coeur d'Alene Tribal boundaries) or the local smoke coordinator (for Kootenai or Benewah County land outside of Coeur d'Alene Tribal boundaries) must verify in a written document setting forth the date of the burn and describing the location of the field that is to be burned, that such field has been baled and loose straw and residue removed from that field. All such written verification shall be submitted to Dan Redline at DEQ (Department of Environmental Quality) where such written records shall be maintained and made available to the public for viewing, with copies to be sent by DEQ to: one counsel for each of the various groups (set forth in footnote 2 above) of parties to this lawsuit (each group of parties must designate in writing to Mr. Redline which attorney shall receive the copy for that group), and the Court.

2. No defendant farmer shall burn until the defendant farmers collectively have placed One Hundred Thousand Dollars $100,000.00[6] cash, with the Clerk of the Court, Kootenai County, in Coeur d'Alene, Idaho. It matters not who pays for such bond, but it is the defendant farmers' responsibility to account among themselves for the amounts contributed, and to distribute any funds remaining among themselves after this Court has determined that any remaining funds may be dispersed back to the defendant farmers. The purpose of this $100,000.00 fund is to make monies available to the plaintiff citizens, should they need funds for: 1) health

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6. Even if all of said fund were used up, that $100,000.00 is 1/60th of what Dr. Van Tassell (the expert called by defendant farmers) testified farmers will loose if they don't burn. That also amounts to $2.70 per acre burned (based on testimony of 37,000 acres).

care expenses actually incurred and related to grass field burning from defendants' fields or 2) actual expenses incurred in relocating during periods of burning.[7] Only the eight plaintiff citizens may apply to the Court for those funds. Such application shall be accomplished by submitting a sworn statement as to why the expenses were incurred, along with a physician's written statement that the medical expenses were incurred due to burning from any of the defendant farmers' fields or a physician's written statement that the move was medically necessary due to burning planned from any of the defendants' fields. If those terms are satisfied, the funds requested shall be released *provided* plaintiff citizens have posted a surety bond (does not need to be a cash bond) with the Clerk of the Court, Kootenai County, in Coeur d'Alene, Idaho, in the amount of One Hundred Thousand Dollars ($100,000.00). The purpose of plaintiff citizens' bond is to provide a fund to repay the defendant farmers' fund, if citizens are found at a later date not to be entitled to these funds from defendant farmers. Neither the fund nor the bond can be used for any other purpose. Neither the fund nor the bond can be used to pay any attorney fees that may later be awarded against a party. Finally, if all parties agree that these funds do not need to be established, burning can continue pursuant to term number one above, upon filing a stipulation with the Court.

The fund created and bond posted give citizens a way to ameliorate the immediate financial hardship that may result, yet protect farmers if at a later time they are found not liable.

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7. Only these items of special damage are allowed to be paid out of this fund. General damages are not included, but are an item of damage left to be litigated at trial.

Appendix D

The reasons for the preliminary injunction under these terms are due to the reasons set forth above, for the reasons set forth in this Court's Memorandum Opinion and Order Denying Defendants' Motions to Dismiss and for the following reasons. This is a dispute over economic issues on one side, and a health issue on the other. As this Court stated at the August 9, 2002 hearing and in its August 19, 2002 "Memorandum Opinion and Order Denying Defendants' Motions to Dismiss" at page 31: "when you balance simple economics issues on one side of the scale, with health and life issues on the other side of the scale, it is easy to see where the scales of justice will tip." The Idaho Supreme Court dealt with an injunction where trespassing was cheaper than other alternatives, in *La Veine v. Stack-Gibbs Lumber Co., 17 Idaho 51, 104 P. 666 (1909)*. That case involved trespass caused by a party who built a dam at the end of Fernan Lake, to allow logs to be transported between Fernan Lake and Coeur d'Alene Lake during low water. The landowners alleged trespass due to the flooding of their land and sought an injunction. It was the dam owner who alleged great injury and damage if unable to float their logs down stream. *104 P. at 667*. The district court permitted the trespass and denied the injunction. The Idaho Supreme Court reversed the district court, and held "That an injunction is the proper relief to be granted in a case of this kind is clearly established." *Id.* The Idaho Supreme Court also stated:

> The defense in this case is sham and frivolous, and utterly devoid of any element of merit. The fact that it would be more convenient and cheaper for defendants to float their logs down this stream over plaintiff's premises than to remove them in

> any other way affords no reason whatever for their trespassing upon plaintiff's premises and building dams thereon, and maintaining guards to protect the same and flooding his premises.

Id. (bold added).

The Idaho Supreme Court has held: "If the municipality is acting in good faith, as we have no doubt it is, an injunction against the continuation of this nuisance can work no injury upon it." *Schreck v. Village of Coeur d'Alene, 12 Idaho 708, 87 P. 1001, 1002 (1906).* In *Schreck,* the City of Coeur d'Alene was doing everything it could to bury the offensive animal and vegetable garbage "and honestly attempted to prevent the dumping of any more offensive matter thereon". *Id.* The Supreme Court then felt that an injunction certainly wouldn't work a hardship: "If the municipality is acting in good faith, as we have no doubt it is, an injunction against the continuation of this nuisance can work no injury upon it." *Id.* In the present case, some of the farmers are not acting in "good faith" as they are not doing all they can to reasonably mitigate the damage to citizens. The following proves that fact. 1) The farmers know the smoke from burning their grass fields has a negative health effect on at least certain people. If the farmers were not aware of it in the past, they were made aware of that through the uncontradicted testimony at the August 9, 2002 hearing ... even their own physician Dr. Moogavkar testified there was no doubt some individuals are legitimately distressed due to the smoke. The farmers certainly know smoke burning has a negative effect on at least certain people after this Court's August 19, 2002 "Memorandum Opinion and Order Denying Defendants'

Motions to Dismiss". 2) The farmers know there is a need to reduce particulate matter. This is proved by the changes to the Smoke Management Plan. This is additionally proved by the fact that 30% of the farmers within the Coeur d'Alene Indian Reservation have agreed to bale their straw before they burn. 3) Baling before burning will result in a reduction, perhaps a "significant reduction" in particulate matter emission. Farmer Paul Stearns testified in the hearing in this case about the fact that 30% of the farmers within the tribal boundaries will bale before burning. In the federal case, Paul Stearns testified that based on tests performed last year on 250 acres that were baled before burning, there was a "very significant decrease in the amount of emissions into the air". Preliminary Injunction Hearing transcript, July 10, 2002, District of Idaho Case Number CV 02-241-N-EJL, p. 516, L. 21—p. 517, L. 17. It only makes sense that if you significantly reduce the amount of fuel, you significantly reduce the amount of pollution. 4) If baling before burning provides a "very significant decrease" in the amount of particulate matter, there is no justifiable reason to limit it to 30% of the farmers within tribal boundaries. If bailing before burning causes a "very significant decrease" in particulate matter, are the remaining farmers who do not bale before burning operating in "good faith"? At the federal hearing Farmer Paul Stearns testified he found a market for his straw last year, (Id. p. 518, L1.1-7), but at the hearing before this Court, Paul Stearns testified that straw has no value this year. However, since his testimony on August 9, 2002, a gentleman named Del Loney from Burley, Idaho has purchased the defunct strawboard plant in Plummer, Idaho from seven grass growers and the Coeur d'Alene Tribe, and Mr. Loney plans

to open such plant by October 1, 2002. Spokesman-Review, August 22, 2002, p. B1, the Handle (Idaho ed.).

IT IS HEREBY ORDERED plaintiffs' motion for preliminary injunction is GRANTED under the terms set forth in Section III above.

ENTERED this 30th day of August, 2002.

s/ John T. Mitchell
John T. Mitchell, District Judge

APPENDIX E — MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS OF THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI DATED AND FILED AUGUST 19, 2002

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO IN AND FOR THE COUNTY OF KOOTENAI

Case No. **CV 2002 3890**

LAWRENCE ("BUD") MOON, JR., et al.,

Plaintiffs,

vs.

NORTH IDAHO FARMERS ASSOCIATION, et al.,

Defendants.

MEMORANDUM OPINION AND ORDER DENYING DEFENDANTS' MOTIONS TO DISMISS

I. FACTUAL BACKGROUND.

Plaintiffs are eight individuals who either themselves have, or who represent minor children who have, chronic pulmonary disorders such as asthma, bronchitis, cystic fibrosis and/or cardiac conditions. Class Action Complaint, ¶ 1. They allege they are at great risk for serious health problems due to smoke from the burning of grass seed stubble

and straw, and are thus differentiated from the rest of the population that are exposed to such smoke. *Id.*¶ 5. Accordingly, plaintiffs shall be referred to as "at risk citizens", or "citizens." The defendants consist of about 78 farmers who farm on the Couer d'Alene Indian Reservation and the Rathdrum prairie (located in Kootenai and Benewah counties), who grow grass seed and who have burned grass residue. *Id.* pp. 10-26, ¶ 23-101. They are referred to as "farmers". Defendant North Idaho Farmers Association (NIFA) is a non-profit organization whose voluntary members are Idaho farmers and corporations, including those who grow turf grasses. *Id.* p. 10, ¶ 22. Finally, the State of Idaho is a defendant. *Id.* p. 26, ¶ 102. On June 10, 2002, plaintiffs filed their "Class Action Complaint" against defendants, seeking: 1) class certification (however, certification has not been brought before the Court at this time); 2) an order from the Court creating an independently supervised medical monitoring program; 3) a preliminary and permanent injunction ordering farmers to immediately stop any agricultural burning in the State of Idaho even if such burning is in compliance with any applicable provision of the Idaho "Smoke Management Plan"; 4) a declaration that citizens' property was taken by the State of Idaho without just compensation and that *Idaho Code § 52-108* and the immunity provisions of the Right to Farm Act (I.C. § 24-4503) are unconstitutional; 5) damages for just compensation for any taking and for future costs incurred as a result of exposure to smoke; 6) costs, attorney fees and the payment of the expenses of the medical monitoring program; and 7) "any other relief the Court deems just and equitable." *Id.* p. 55-56. As of the date of this opinion, none of the farmers have filed an answer to the Class Action Complaint.

Appendix E

Citizens' attorneys scheduled a two day hearing for a temporary restraining order, to be held on July 18-19, 2002. The week before that hearing was scheduled, citizens' attorneys cancelled such hearing, as one of them was traveling to England. Citizens' Motion for Temporary Restraining Order and Order to Show Cause for Issuance of Preliminary Injunction was filed on July 31, 2002.[1] Citizens' attorneys made no request to reschedule the hearing until August 1, 2002, at which time citizens' attorneys called the Court to schedule the hearing on their motion for TRO and preliminary injunction, and they were given a one day hearing on August 9, 2002.

The State of Idaho and some of the farmers[2] filed motions to dismiss on August 7, 2002. Other farmers filed their motions to dismiss on August 8, 2002. All motions to dismiss were pursuant to *I .R.C.P. 12(b)(6)*, failure to state a claim upon which relief could be granted. None of the motions to dismiss were timely filed relative to the hearing date the

1. Injunctive relief is not sought against defendant NIFA, and thus, the attorney for NIFA did not appear at the August 9 and 15, 2002 hearings. Affidavit of Donald J. Farley, filed August 5, 2002.

2. Various farmers are represented by various attorneys, and all have submitted pleadings. So as to avoid confusion in referencing those pleadings in this and future decisions, the groups of farmers as represented by their attorneys will be referred to as follows: McLean, Asher and Place represented by Michael E. McNichols are referred to as McLean et al.; Lampert Farm, Clausen, M. LaShaw, Morris, Nichols, Towne, Bloomsburg, B. LaShaw, Heaton and Sievers represented by Michael E. Ramsden are referred to as Lampert et al.; Meyer, Deshiell and others are represented by Peter Erbland, Gary H. Baise and Stewart D. Fried are referred to as Meyer et al.

farmers noticed up (*I.R.C.P.6(d)*), but in Plaintiffs' Partial Objection to Defendants' Motion to Shorten Time filed August 8, 2002, and again at hearing on August 9, 2002, Steve Berman, attorney for citizens, did not object to the Court's hearing the farmers' motions to dismiss on the issues of preemption, nuisance and trespass. The farmers motions to dismiss on the theories of strict liability, conspiracy, medical monitoring and the State of Idaho's motion to dismiss on the issues of constitutionality of the statutes and taking without just compensation, were agreed by all counsel at hearing on August 9, 2002, to be deferred to a later date. Hearing on the citizens' motion for a temporary restraining order, and motion for preliminary hearing, and the farmers' motions to dismiss as to the issues of 1) pre-emption, 2) nuisance and 3) trespass, were held August 9, 2002. Evidence and argument by counsel were presented. The matter was continued to another hearing held August 15, 2002, to give all parties the opportunity to submit additional briefing to the Court on the issues of trespass and nuisance. Additional evidence and argument were presented at the August 15, 2002 hearing. The Court has carefully considered the extensive briefing submitted, the case law provided, the testimony, affidavits and exhibits offered, and arguments of counsel in support of and in opposition to these motions.

At the first hearing, Trina Heisell testified that her child was kept in the hospital for 17 days until they were done burning, and now they leave the area until the second week of September when hopefully, burning is completed. She testified her child's symptoms continue for about four months after the burning stops. Laura Fowler testified her child has asthma, and that field burning causes her medications to

increase, use of steroids increase, she fights for her breath, gets shaky and that these symptoms hang on for a while even after the burning has stopped. Bud Moon testified about the respiratory problems he has had due to the smoke from grass fields as the smoke hits the Sandpoint/Hope Idaho area where he has resided for 77 years Dr. Covelli (pulmonary critical care) and Dr. Strimas (allergist and immunologist) testified about the relationship they have seen between increased respiratory symptoms and grass field burning. Dr. Tamasky testified on behalf of the farmers. He is a gynecologist (lack of foundation for any pulmonary opinion), and he owns 220 acres which he leases to grass seed farmers who burn (possible bias), so the opinions Dr. Tamasky gave regarding the relationship between grass field burning and pulmonary problems are accorded little if any weight.

The Court will first explain why a hearing on the temporary restraining order was held. A motion for a temporary restraining order may be granted *ex parte*, without a hearing. *I.R.C.P. 65(b)*. However, because many of the defendants had appeared in this case and were represented by counsel by the time the temporary restraining order was requested, and because the injunction sought encompassed so much of the controversy between the parties, an exercise of caution indicated this Court should use its discretion and conduct a hearing so the parties could present evidence and argument in addition to what had been presented by briefing. The Idaho Supreme Court in *Lawrence Warehouse Co. v. Rudio Lumber Co., 89 Idaho 389, 395, 405 P.2d 634 (1965)* indicated there should be a hearing where the injunction "encompasses the entire controversy between the parties." Any injunction in this case could encompass the "entire"

controversy, or nearly the entire controversy. Justice Thomas in *Mountain States Tel. & Tel Co. v. Jones, 75 Idaho 78, 267 P.2d 634 (1954)*, wrote:

> The discretionary power vested in the court to grant injunctive relief in such cases is not an arbitrary one; it is a sound and legal discretion which should be exercised with great caution; the requirements of caution and sound legal discretion can only be had upon a full hearing; it is indeed a delicate power which requires an abundance of caution, deliberation and sound discretion based upon a full disclosure of the facts which demonstrate with reasonable certainty and persuasiveness the probability of confiscation; it cannot be exercised soundly or with caution without hearing all the relevant facts on the issues joined with reference to the probability of confiscation.

75 Idaho at 86, 267 P.2d at 638. Cited in *Lawrence Warehouse Co. v. Rudio Lumber Co., 89 Idaho at 395, 405 P.2d at 640*.

II. MOTIONS TO DISMISS.

As stated above, the motions to dismiss that are before the Court at the present time, are the farmers' motions to dismiss citizens causes of action based on 1) federal pre-emption, 2) nuisance claims and 3) trespass claims. Farmers claim federal law (the Clean Air Act, *42 U.S.C. § 7401*, as implemented through the State Implementation Plan (SIP),

Idaho Code § 39- 105—39-107 and IDAPA 58 .01.01), preempts common law nuisance and trespass claims. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 4-17. Farmers argue citizens' claims under the common law torts of private and public nuisance are barred by *Idaho Code § 52-108* and *Idaho Code § 22-4503. Id.* pp. 17-19. Farmers argue citizens' claims under the common law tort of trespass is not a proper cause of action as smoke and soot give rise only to a nuisance claim, not a trespass claim, as with trespass there has to be an invasion which interferes with the right of exclusive possession of the land which is a direct result of some act committed by the defendant, and that if there is a trespass, farmers have a prescriptive easement over the land since they have been burning for "many, many years." *Id* . pp. 19-24.

A. FEDERAL PRE-EMPTION.

Farmers claim federal law (the Clean Air Act, *42 U.S.C. § 7401*, as implemented through the State Implementation Plan (SIP), *Idaho Code § 39- 105—39-107* and IDAPA 58.01.01), preempts common law nuisance and trespass claims. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 4-17. Specifically, farmers claim the federal Clean Air Act, *42 U.S.C. §§ 7401* to *7671q*, preempt citizens' common law claims. *Id.* p. 8.

The United States Congress enacted the federal Clean Air Act (CAA) to address the failure of the various states to cooperate with the federal government in its efforts to protect America's air resources. 42 U*.S.C.I § 7401, ASARCO Inc. v. EPA, 578 F.2d 319 (D.C.Cir.1978).* The CAA has National

Ambient Air Quality Standards (NAAQS), which cover "particulate matter" ("PM") and other pollutants. 36 Fed.Reg. 8186. Congress directed the states to develop, adopt after notice and public hearing, and enforce state plans (State Implementation Plans, or "SIP") to implement the CAA. A state must submit its SIP to the federal EPA for approval. Idaho has a SIP approved by the EPA. 40 CFR § 52.6. *Idaho Code § 39-105* and *39-107* authorize the State of Idaho Department of Environmental Quality (DEQ) to promulgate air pollution rules. The DEQ has promulgated the Idaho Rules for the Control of Air Pollution in Idaho ("IDAIR"). IDAPA 58.01.01. The Idaho SIP regulates open burning, such as the burning of agricultural fields by the farmers, through IDAIR. IDAPA 58.01.01—600 through 616. Agricultural field burning needs a permit (IDAPA 58.01.01.614.01(a)) or, if no permit is required, any person who burns must "meet all conditions set forth in a Smoke Management Plan for Prescribed Burning." IDAPA 58.02.02.614.02(a). *Idaho Code §§ 22-4801*—4804 set forth the Smoke Management and Crop Residue Disposal Act (SMCRDA). Pursuant to SMCRDA the Idaho Department of Agriculture adopted Crop Residue Disposal Rules and implemented a statewide crop residue disposal and smoke management plan. IDAPA 02.06.16. The Crop Residue Rules and the Smoke Management Plan set forth the program for permitting the burning of agricultural fields in the State of Idaho. Each field to be burned in Kootenai and Benewah counties must be registered with the DEQ before burning. *Idaho Code § 22-4803(3)*; IDAPA 02.06.16.100. After registering the field, a person may burn that field only on the dates and times set forth by the Idaho Department of Agriculture. ADAPA 20.06.16.200. However, burning shall not begin if the PM

(particulate matter) level for an area has been reached or is predicted to be reached. If the $PM^{2.5}$ one hour levels have reached 80% of the standard, or an air stagnation is declared by DEQ, no new burning can be initiated. IDAPA 58.01.01.550; IDAPA 2.06 .16.500.02. Smoke particles are measured at $PM^{2.5}$ (small particles less than 2.5 microns, or less than 1/25th the diameter of a human hair) and at PM^{10} (less than 10 microns).

Farmers argue these federal regulations, as implemented through state statutes and rules, preempt the common law torts of nuisance and trespass. Farmers cite a plethora of cases which they claim support their argument. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 8-17. The problem with farmers' argument is that none of those cases applied any state's common law torts of nuisance or trespass to the Clean Air Act (CAA). Each of those cases dealt with the CAA preempting other federal statutes, such as the Americans with Disabilities Act and the Rehabilitation Act in *Save Our Summers v. Washington Dept. of Ecology, 132 F.Supp.2d 896 (E.D.Wash.2000)* and the federal Resource Conservation and Recovery Act in *Safe Air For Everyone v. Meyer et. al.*, ____ F.Supp.2d ____, (D.Idaho 2002). *International Paper Co. v. Ouellete, 479 U.S. 481 (1987)* specifically held that the Clean Water Act did not preempt claims of nuisance asserted by land owners in the state of Vermont. *Middlesex County Sewerage Auth. V. National Sea Clammers Association, 453 U.S. 1, 101 S.Ct. 2615, 69 L.Ed.2d 435 (1981)* held that federal common law claims of nuisance, which are unavailable to private parties such as the farmers in the present case, are preempted by the Federal Water Pollution Control Act (FWPCA). *453 U.S. at*

21, 101 S.Ct at 2627, 69 L.Ed.2d at 451-52. It is clear that the United States Supreme Court did not address any state tort claims. *453 U.S. at 5, n. 6 and n. 8, 101 S.C.t at 2619, n. 6 and n. 8, 69 L.Ed.2d at 441-42, n. 6 and n. 8.* Two federal district of Idaho judges (Callister and Ryan respectively) in *State of Idaho v. Hanna Mining Co., 882 F.2d 392 (1989)* and *State of Idaho v. Bunker Hill, 635 F.Supp. 665 (1986),* both clearly stated there is no preemption of a state common law nuisance claim, though these two cases specifically dealt with state law (Idaho Environmental Protection and Health Act of *1972, I.C. § 39-101*—114). As noted by Judge Callister in *Hanna*, "Statutory changes abolishing the common law are not presumed." 882 F.2d at 834, citing *Williams v. Blakely, 114 Idaho 323, 757 P.2d 186 (1987).* The Idaho Legislature has spoken as to the State's strong policy protecting the environment of the State of Idaho and the health of its citizens:

> It is hereby recognized by the legislature that the protection of the environment and the promotion of personal health are vital concerns and are therefore of great importance to the future welfare of this state. It is therefore declared to be the policy of the state to provide for the protection of the environment and the promotion of personal health and to thereby protect and promote the health, safety and general welfare of the people of this state.

I.C. § 39-102(1). The Idaho Environmental and Protection and Health Act specifically contemplates civil actions in

addition to governmental enforcement actions, as the Act states:

> No action taken pursuant to the provisions of this act or of any other environmental protection law shall relieve any person from any civil action and damages that may exist for injury or damage resulting from any violation of this act or of the rules, permits and orders promulgated thereunder.

I.C. § 39-102(7).

Farmers must be claiming state common law is preempted as there is no general federal common law. "Federal courts, unlike state courts, are not general common law courts and do not possess a general power to develop and apply their own rules of decision." *Safe Air For Everyone v. Meyer et. al.*, ____ F.Supp.2d ____, (D.Idaho 2002), citing *National Audobon Society, et al. v. Department of Water, et al., 869 F.2d 1196, 1200 (9th Cir.1988)*, in turn quoting *Milwaukee v. Illinois, 451 U.S. 304, 312 (1981).*

Finally, there is a general savings clause within the citizen suit provisions of the Clean Air Act which states:

> Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any emission standard or limitation or to seek any other relief.

42 U.S.C. § 7604(e).

Appendix E

The farmers' claims that the citizens' lawsuit is barred by the doctrine of preemption, is misplaced. There is no preemption. Farmers' motions to dismiss on the grounds of preemption are DENIED.

B. STATE COMMON LAW CLAIMS OF NUISANCE.

1. *IDAHO CODE § 52-108.*

Citizens allege nuisance as their first cause of action. Complaint, pp. 47-49, ¶ 179-192. Citizens allege both public and private nuisance. Complaint, p. 47, ¶ 185. The Idaho Code defines "nuisance" as follows:

> Anything which is injurious to health or morals, or is indecent, or offensive to the senses, or an obstruction to the free use of property, so long as to interfere with the comfortable enjoyment of life or property, or unlawfully obstructs the free passage or use, in the customary manner, of any navigable lake, or river, stream, canal, or basin, or any public park, square, street, or highway, is a nuisance.

Idaho Code § 52-101. A "public nuisance" is defined as follows:

> One which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal.

Idaho Code § 52-102. In Idaho, a "private nuisance" is one that is "not defined by law as a public nuisance or as a moral nuisance." *Idaho Code § 52-107.*

Discussed below under the trespass section (section C), is the confusing interplay between trespass and nuisance. Under the more modern definitions of nuisance which require a "substantial interference with the use and enjoyment of his land" (*Bradley v. American Smelting & Refining Co., 635 F.Supp. 1154, 1157 (W.D.Wash.1986),* citizens have alleged sufficient facts to show a "substantial interference with the use and enjoyment of their land." They have alleged and testified about the health problems caused, the need to lock themselves in their homes during times of grass field burning, and the need to leave the area until burning is complete.

Farmers argue that *Idaho Code § 52-108* bars the citizens' nuisance claims. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 17. *Idaho Code § 52-108* reads:

> When not a nuisance.—Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

Citizens claim that *Idaho Code § 52-108* is unconstitutional. Complaint, p. 53, ¶ 223. After reviewing the many cases cited by both sides, and upon its own research, this Court is convinced that *Idaho Code § 52-108* is constitutional, but only if it applies to public nuisances. This Court is convinced for at least seven reasons, discussed below, that the proper reading of *Idaho Code § 52-108*, is that it applies only to

public nuisances. Thus, citizens' claims, to the extent they arise under a theory of public nuisance may be barred by *Idaho Code § 52-108* (this is actually a burden shifting statue as addressed in part 7 below). Farmers' Motions to Dismiss are DENIED upon the public nuisance theory, but the Court notes the burden shifting required under *Idaho Code § 52-108* for public nuisance claims. Farmers' Motions to Dismiss under theories of private nuisance are DENIED in all aspects.

The following are the reasons why *Idaho Code § 52-108* applies only to public nuisances, and thus, why citizens' private nuisance claims are not barred.

1. Constitutional Interpretation. This Court is mindful that statutes should be interpreted when possible, to avoid raising constitutional questions. *United States v. Grace, 461 U.S. 171, 175-76 (1983)*; *Crowell v. Benson, 285 U.S. 22, 62 (1932)*. The Idaho Supreme Court has held: "The cardinal principle of statutory construction is to save and not destroy. *Keenan v. Price, 68 Idaho 423, 195 P.2d 662 (1948)*. The Iowa Supreme Court held Iowa's Right to Farm act was unconstitutional in granting immunity for private nuisance, and that:

> This immunity [from nuisance suits] resulted in the Board's taking of easements in the neighbors' properties for the benefit of the applicants. The easements entitle the applicants to do acts on their property, which, were it not for the easement, would constitute a nuisance. This amounts to a taking of a private property for public use without the payment of just compensation in violation of the Fifth Amendment to the Federal Constitution.

Appendix E

> This also amounts to a taking of private property for public use in violation of *article I, section 18 of the Iowa Constitution.*

Borman v. Board of Supervisors, 584 N.W.2d 309, 321 (Iowa 1998). The choice here is 1) *Idaho Code § 52-108* applies only to public nuisances and is constitutional, or, 2) if *Idaho Code § 52-108* applies to private nuisances (as well as public nuisances), there is a taking (*see Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 331 (1883)* and *Richards v. Washington Terminal Co., 233 U.S. 546, 553 (1914)*), and if there is no remedy available to citizens for that taking, then *Idaho Code § 52-108* is unconstitutional. The power of the legislature to control and regulate nuisances is not without restriction, and it must be exercised within constitutional limitations. *66 C.J.S. Nuisances § 7, at 738 (1950).* That quote also illustrates the choice this Court must make between the two alternatives. The Court chooses the constitutional interpretation, that *Idaho Code § 52-108* only applies to shift the burden in public nuisance cases.

Furthermore, "The compiled laws establish the law of this state respecting the subjects to which they relate, and their provisions and all proceedings under them are to be liberally construed, with a view to effect their objects and to promote justice." *Idaho Code § 73-102.* All statutes must be liberally construed with a view to accomplishing their aims and purposes, attaining substantial justice, and the courts are not limited to the mere letter of the law, but may look behind the letter to determine its purpose and effect, the object being to determine what the legislature intended, and to give effect to that intent. *Keenan v. Price, 68 Idaho 423, 195 P.2d 662 (1948).*

2. All Idaho Supreme Court cases interpreting *Idaho Code § 52-108*, deal with public nuisances. *Twin Falls v. Harlan, 27 Idaho 769, 151 P. 1191 (1915)*; *Village of American Falls v. West, 26 Idaho 301, 142 P. 42 (1914)*; *Boise City v. Boise City Canal Co., 19 Idaho 717, 115 P. 505 (1911)*; *Lewiston v. Isaman, 19 Idaho 653, 115 P. 494 (1911)*; *MacCammelly v. Pioneer Irrigation Dist., 17 Idaho 415, 105 P. 1076 (1909)*. This interpretation that *Idaho Code § 52-108* only applies to public nuisances is bolstered by United States Supreme Court interpretation that legislative authorization only exempts liability from State actions, "it does not affect any claim of a private citizen for damages for any special inconvenience and discomfort not experienced by the public at large." *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 332 (1883)*. This interpretation makes sense as the state cannot legislate away the private property rights of the citizens without paying just compensation. *Brown v. County Commissioners of Scioto County, 87 OhioApp.3d 704, 713, 622 N.E.2d 1153, 1159 (Ct.App.4th Dist.1993)* indicates this interpretation of a similar statute: "Since a pollution control facility operates under sanction of law, it cannot be a common-law public nuisance." "This is another way of saying that although it would be a nuisance at common law, conduct which is fully authorized by statute or administrative regulation is not actionable in tort." *Id.* In *Scioto*, public nuisance is analyzed under a negligence *per se* and burden shifting analysis. *87 OhioApp.3d at 714-15, 622 N.E.2d at 1160-61*. Private nuisance was analyzed separately and differently. *87 OhioApp.3d at 715-16, 622 N.E.2d at 1161*.

3. The "great principle of common law" is that one may not use their property to injure others, even if authorized by statute. *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 331 (1883).* "It should be remembered that this property belongs to appellant, and that it has a right to use it in any lawful manner in which it sees fit to employ its property, so long as it does not damage anyone else." *Lorenzi v. Star Market Co., 19 Idaho 674, 684, 115 P. 490 (1911). Ransom v. Garden City, 113 Idaho 202, 208, 743 P.2d 70, 76 (1987).* Applying *Idaho Code § 52-108* to abolish private nuisance claims would certainly be inconsistent with these cases.

4. The Environmental Protection and Health Act indicates that *Idaho Code § 52-108* only applies to public nuisances. Again, the Idaho Legislature has spoken as to the State's strong policy protecting the environment of the State of Idaho and the health of its citizens:

> It is hereby recognized by the legislature that the protection of the environment and the promotion of personal health are vital concerns and are therefore of great importance to the future welfare of this state. It is therefore declared to be the policy of the state to provide for the protection of the environment and the promotion of personal health and to thereby protect and promote the health, safety and general welfare of the people of this state.

I.C. § 39-102(1). If this is the stated policy of the State of Idaho, then what are asthmatics and cystic fibrosis sufferers

to do if the Idaho Environmental and Protection and Health Act does not protect them because some other less specific statute (*Idaho Code § 52-108)* bars a private nuisance claim? In statutory construction, the more specific statute controls over the more general. *Idaho Code § 72-102*; *People ex rel. Springer v. Lytle, 1 Idaho 143 (1867)*; *State v. Jones, 34 Idaho 83, 199 P. 625 (1921)*; *Herrick v. Gallet, 35 Idaho 13, 204 P. 477 (1922)*; *In re Drainage District No. 3, 40 Idaho 549, 235 P. 895 (1925)*. The Idaho Environmental and Protection and Health Act specifically contemplates civil actions in addition to governmental enforcement actions, as the Act states:

> No action taken pursuant to the provisions of this act or of any other environmental protection law shall relieve any person from any civil action and damages that may exist for injury or damage resulting from any violation of this act or of the rules, permits and orders promulgated thereunder.

I.C. § 39-102(7). The fact that *Idaho Code § 52-108* does not apply to private nuisance claims is supported by *State of Idaho v. Hanna Mining Co., 882 F.2d 392 (1989)* and *State of Idaho v. Bunker Hill, 635 F.Supp. 665 (1986)*, which both upheld the bringing of common law nuisance claims.

5. *Varjabedian v. City of Madera, 20 Cal.3d 285, 572 P.2d 43 (1977)*. As noted in citizen's Brief in Support of Nuisance and Trespass Claims, pp. 16- 17, *Varjabedian v. City of Madera, 20 Cal.3d 285, 572 P.2d 43 (1977)* is very much on point. The California Supreme Court interpreted a statute very similar to *Idaho Code § 52-108* in a manner

consistent with the *Baltimore & Potomac R.R. Co. v. Fifth Baptist Church, 108 U.S. 317, 331 (1883)* case. The city claimed the general authorization of municipal construction expressly sanctioned the production of any particular level of odors from a sewage treatment plant. The California Supreme Court rejected that claim, stating:

> None of the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities. Nor can we find that such odors were authorized by the "plainest and most necessary implication" from the general powers conferred, or that it can be fairly said that the Legislature contemplated, to any extent, the creation of a malodorous nuisance when it authorized sewage plant construction. Indeed, one object of such plants is to *remove* harmful and obnoxious effluents from the environment.

572 P.2d 43 at 48. (emphasis in original). Just as "none of the the Government Code statutes under which the city claims to act mentions the possibility of noxious emanations from such facilities" in *Varjabedian*, in the present case there is nothing in the SIP regulations that mentions the possibility that particulate matter would get to a level that would harm citizens with breathing problems. This Court finds *Varjabedian* to be very much on point.

Appendix E

6. Opacity Standards. *Idaho Code § 52-108* reads:

> When not a nuisance.—Nothing which is done or maintained under the express authority of a statute can be deemed a nuisance.

The Court finds persuasive citizens' argument that because farmers' burning is not maintained in accordance with authority of a statute (the opacity standards of IDAPA 58.01.01.625), *Idaho Code § 52-108* does not operate to ban citizens' negligence actions. The evidence of Aaron Day, an expert certified[3] in testing emissions for compliance with opacity standards was uncontradicted, smoke from grass seed field burning violates the visible emissions standards contained in IDAPA 58.01.01.625, which provides:

> A person shall not discharge any air pollutant into the atmosphere from any point of emission for a period or periods aggregating more than three (3) minutes in any sixty (60) minute period which is greater than twenty percent (20%) opacity as determined by this section.

Farmers countered that a "field" is not defined as a point source of emission or a "stationary source" under 40 CFR part 60, Appendix A, Method 9. Mr. Day's opinion was that while "field" is not listed, "facility" is listed, and would

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3. Mr. Day testified he is employed by Trinity Consultants in Des Moines, WA. He has a chemical engineering degree from Massachusetts Institute of Technology, he is a professional engineer in the State of Washington, does air quality consulting and is certified in plume evaluation or measuring opacity from its source.

include fields in his opinion. The Idaho rules omit "facilitiy" but do include "emissions unit". IDAPA 58.01.01.006. Mr. Day's interpretation is that "emissions unit" includes agricultural field burning. Mr. Day's opinions on this subject are uncontradicted. Farmers put on no expert or other testimony to counter Mr. Day's expert opinions.

7. *Idaho Code § 52-108* creates a rebuttable presumption in public nuisance cases. Citizens argue that even if Idaho Statutes expressly allow the type of irreparable harm alleged, *Idaho Code § 52-108* simply establishes a rebuttable presumption that the farmers' actions are not a nuisance. Citizens' Brief in Support of Nuisance and Trespass Claims, pp. 19-20. *Boise City v. Boise City Canal Co., 19 Idaho 717, 724, 115 P. 505 (1911)* and *MacCammelly v. Pioneer Irrigation District, 17 Idaho 415, 423, 105 P. 1076 (1909)* would certainly lead to that interpretation. In *Boise City*, the Idaho Supreme Court quoted from its decision two years earlier in *MacCammelly* and stated:

> Said canal was constructed and maintained under the express authority of a statute and for that reason it cannot be deemed a nuisance under the express provision of sec. 3659, Rev.Codes [predecessor to *I.C. § 52-108*]. When a thing complained of is lawful, *the burden is upon the plaintiff to show that it has become a nuisance in fact*, which was not done in this case. The canal had an actual and lawful existence at the time the road was located and unless it is shown that it has become a nuisance, it will not be *presumed* that it has become such.

19 Idaho 717, 724, 115 P. 505, 512; 17 Idaho 415, 423, 105 P. 1076, 1084. (italics added). The italicized portion indicates the past interpretation of the Idaho Supreme Court is that *Idaho Code § 52-108* is a burden shifting statute, not an outright abolition of nuisance causes of action. It is this Court's interpretation in the present case, that *Idaho Code § 52-108* only applies to public nuisances (and not private nuisances), and that as to public nuisances, it is not a statute that abolishes public nuisances, but that creates burden shifting presumptions in public nuisance cases.

2. *IDAHO CODE § 22-4503.*

Farmers next contend that *Idaho Code § 22-4503* prohibits a nuisance cause of action. Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 18-19. *Idaho Code § 22-4503*, a part of Idaho's "Right to Farm Act", reads:

> Agricultural operation not a nuisance—Exception.—No agricultural operation or an appurtenance to it shall be or become a nuisance, private or public, by any changed conditions in or about the surrounding nonagricultural activities after the same has been in operation for more than one (1) year, when the operation was not a nuisance at the time the operation began ...

This statute expressly applies to both public and private nuisances, but a plain reading of the statute makes it clear that it only applies to the situation where the "nonagricultural activity" at a point in time after the agricultural activity has

already begun, "comes to the nuisance". All the statute does is clarify the existing common law doctrine of "coming to the nuisance", making it clear that an agricultural operation need only be in operation for only one year, before any subsequent nonagricultural activity that moves in or "comes to the nuisance" is barred. That fact situation is not present in the instant case, and thus, *Idaho Code § 22-4503* is not applicable as a bar to citizens' nuisance action in this lawsuit.

In the only two Right to Farm Act cases that have come before it, the Idaho Supreme Court has held that the Right to Farm Act applies only to surrounding activities that encroach upon existing agricultural operations. *Crea v. Crea, 135 Idaho 246, 248-49, 16 P.3d 922, 924-25 (2000)* ("the Act's intent [is] to address the encroachment of 'urbanizing areas,' as well as changes in 'surrounding nonagricultural activities,' " and holding the expansion of a hog farm was not protected); *Payne v. Skaar, 127 Idaho 341, 344, 900 P.2d 1352, 1355 (1995). See also Carpenter v. Double R Cattle Co., 105 Idaho 320, 322, 669 P.2d 643, 655 (Ct.App.1983).* This interpretation is also consistent with *Rancho Viejo, LLC v. Tres Amigos Jiejos, LLC, 2002 WL 1691450 (Cal.App. 4th Dist., July 25, 2002),* furnished by counsel for Meyer et al. That case interpreted California's Right to Farm Act which is similar to Idaho's except that it requires three years existence rather than one year. In reviewing the legislative history of California's Right to Farm Act, the California Court of Appeal made it clear these the California legislature intended the Act be applied only in "coming to the nuisance" cases:

> In that letter, Assemblyman Thurman stated: "AB 585 is an important step in eliminating suits by

> individuals who have moved to a new housing development 'in the country' and find the long-established farm bordering their back fence offends their senses." *Id.*, p. 5. The present case is not a "coming to the nuisance" case. Accordingly, *Idaho Code § 22-4503* is not applicable as a bar to citizens' nuisance action in this lawsuit.

For the reasons set forth in part B.1 and B.2 above, farmers' motions to dismiss citizens' nuisance causes of action are DENIED in their entirety.

C. STATE COMMON LAW CLAIMS OF TRESSPASS.

Citizens have also sued in trespass. Complaint, pp. 49-50, ¶ 193-198. As citizens have noted, most nuisance actions also include a trespass allegation. Citizens' Brief in Support of Nuisance and Trespass Claims, p. 24, citing *Sinclair* 30 IDAHO LAW REVIEW 496. "The theories of trespass and nuisance are not inconsistent, and they may apply concurrently, and the injured party may proceed under both theories when elements of both actions are present." *Bradley v. American Smelting and Refining Co., 104 Wash.2d 677, 709 P.2d 782 (Wash.1985).*

In Idaho there is both criminal trespass (*I.C. § 18-7008)* and civil trespass (*I.C. § 6-202)*. Idaho's civil trespass statutes recognize the invasion of land by particulates, ash and pollutants since it uses the word "substances". *Idaho Code § 6-202A*. The words "enters" and "entry" mean "going upon or over real property, either in person or by causing any

object, substance or force to go upon or over real property." *Idaho Code § 6-202A*. (emphasis added).

Farmers argue that trespass requires an "entry onto the land", citing *Mock v. Potlatch*, 796 F.Supp. 1545 (D.Idaho 1992). McLean et. al's Supplemental Memorandum in Opposition to Motion for Preliminary Injunction, p. 10. In *Mock*, Judge Ryan held that noise from Potlatch's Lewiston turbine electrical generators did not constitute a trespass. Judge Ryan noted that as of 1992, "The Idaho Supreme Court has not addressed the question of whether intangible entries onto another's land in the form of noise, smoke, light or odor can give rise to an action for trespass." 796 F.Supp. at 1548. Since the facts of his case only dealt with "noise", Judge Ryan's mention of "smoke, light or oder" was dicta. Judge Ryan noted the modern trend:

> However, a modern trend has emerged under which airborne pollution may constitute a trespass, where the plaintiff can demonstrate physical damage to his property.... The modern trend departs from the traditional rule by finding that intangible invasions of the plaintiff's property may constitute a trespass. However, the modern trend also departs from traditional trespass rules by refusing to infer damage as a matter of law, thereby eliminating the right to nominal damages. *The plaintiff claiming trespass must prove that the intangible invasion resulted in substantial damages to the plaintiff's land. Id.* (citations omitted) (emphasis added).

796 F.Supp at 1549. In the present case, citizens are claiming more than "nominal" damage. They have alleged substantial damages (health problems, inability to breathe, needing to move away from their home). The amount of damage awarded remains to be seen, but this case is at the motion to dismiss juncture, and citizens have alleged substantial damage.

As noted by citizens, there is no Idaho appellate decision on point, but the State of Oregon has addressed trespass with respect to field burning and found that such smoke can constitute a trespass. Citizens' Brief in Support of Nuisance and Trespass Claims, p. 25. In *Ream v. Keen, 314 Or. 370, 838 P.2d 1073 (1992)*, the Oregon Court of Appeals held that the smoke from field burning trespassed by drifting over plaintiffs' property. *314 Or. at 372-73*. In *Koos v. Roth, 293 Or. 670, 690, 652 P.2d 1255 (1982)*, the Supreme Court of Oregon found that trespass resulted from the farmer's field burning. The Supreme Court of Oregon in *Davis v. Georgia-Pacific Corp., 251 Or. 239, 242- 43, 445 P.2d 481 (1968)* found airborne particles from a pulp mill constituted trespass even if invisible.

Washington courts have also recognized trespass by microscopic particles. In *Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985)* the Supreme Court of Washington held that airborne chemical substances from a smelter was a trespass upon plaintiffs' land. Another case allowing smelter emissions as a trespass is the Supreme Court of Alabama's decision in *Borland v. Sanders Lead Co., 369 So.2d 523 (Ala.1979)*.

Appendix E

Similar cases from other states (which also illustrate that this is not a particularly "new" development in the law) include: *Roberts v. Kaiser Permanente Corp., 188 Cal.App.2d 526, 10 Cal.Rptr. 519 (Cal.Ct.App.1961)* (cement dust as trespass); *Sheppard Envelope Co. v. Arcade Malleable Iron Co., 138 N.E.2d 777 (Mass.1956)* (particulate emissions as trespass); *Hall v. De Weld Micca Corp., 93 S.E.2d 56 (N.C.1956)*(trespass for minute and invisible particles of silicon dioxide) and *Ingmundson v. Midland C. R.R., 173 N.W. 752 (N.D.1919).*

Farmers argue that in *Ream* while the Oregon Supreme Court held the deposit of particulate matter on another's land can constitute trespass, "the Oregon Supreme Court acknowledged that the result might have been different if the deposit of particulates had been less substantial." McLean et. al's Supplemental Memorandum in Opposition to Motion for Preliminary Injunction, p. 12. That isn't really what the Oregon Supreme Court said. What the Oregon Supreme Court actually stated is as follows:

> Defendant argues that, in *Martin et ux v. Reynolds Metals Co., 221 Or. 86, 342 P.2d 790 (1959), cert. den. 362 U.S. 918, 80 S.Ct. 672, 4 L.Ed.2d 739 (1960)*, "the court stated that in some cases trespass might not lie because the actionable invasion was so trifling that the law would not consider it," and "[s]ome intrusion may be allowable even though substantial if the court refuses to recognize the plaintiff has a legally protected interest in the particular possessory use as against the particular conduct of the defendant."

Although defendant's characterization of those considerations in *Martin* is accurate, he does not show how they might benefit him.

The court said in *Martin:*

"In every case in which trespass is alleged the court is presented with a problem of deciding whether the defendant's intrusion has violated a legally protected interest of the plaintiff. *In most cases the defendant's conduct so clearly invades the well established possessory interest of the plaintiff that no discussion of the point is called for."*

221 Or. at 95, 342 P.2d 790. (Emphasis supplied.) Defendant advances no reason, and we discern none, why this case is not among the ordinary ones that call for no discussion of the point. Plaintiffs' buildings were affected by the smoke, and there was a heavy pall of smoke over their property for short periods, followed by a residual smoke odor for several days after each of the burning incidents. We conclude that defendant's conduct resulted in an invasion of plaintiffs' legally protected possessory interest, as a matter of law.

We also reject defendant's argument that the intrusion was so "trifling" that it was not cognizable as a trespass. In *Martin*, the court noted that the maxim *de minimis non curat lex* can apply in trespass cases and gave as an example that "the

casting of a grain of sand upon another's land would not be a trespass" nor would other intrusions that do "no actual damage or [cause] no interference in any way with a legitimate use of the premises." *221 Or. at 97-98, 342 P.2d 790.*

This is not such a case. Defendant attempts to avoid that conclusion by using minimalistic descriptions of what occurred, *e.g.*, "the passage of smoke over a portion of plaintiff's land for a brief period of time." Those descriptions might be appropriate in a jury argument regarding the amount of damages. However, as we understand the *Martin* test, there is no connection between the factual question of the amount of damages and the legal *"de minimis"* determination that the court must make in deciding whether the law of trespass applies. Indeed, actual damage is not necessary for a defendant to be liable for intentional trespass. *221 Or. at 97, 342 P.2d 790; but see 221 Or. at 98, 342 P.2d 790.* The question that the court must consider is whether the intrusion is so minimal that, as a matter of law, no legal consequences *can* attach. We hold that the answer here is no.

Defendant relies on cases from other jurisdictions that do not assist him, *inter alia*, because of differences between the jurisdictions' law and Oregon's. He also relies on *Amphitheaters, Inc. v. Portland Meadows, 184 Or. 336, 198 P.2d 847 (1948)*, for the proposition that intrusion by smoke

> necessarily falls under the law of nuisance rather than trespass. Assuming that that case was ever authority for that proposition, the later decisions in *Davis v. Georgia-Pacific*, *supra* and *Martin et ux v. Reynolds Metals Co .*, *supra*, say that it can constitute an intentional trespass.

828 P.2d at 1039-1040. In the present case, it cannot be said that the "actionable invasion was so trifling that the law would not consider it", since the actionable invasion has caused health problems and people to move from there homes for periods of time. The invasion here is not so "trifling" that it is not cognizable as a trespass. Farmers' attempt to discredit *Ream* is without merit.

Certainly there are cases that support farmers' position that smoke and particulate matter is really a nuisance rather than a trespass. Most of those cases are older cases. *See Thackery v. Union Portland Cement Co., 64 Utah 437, 231 P. 813 (Utah 1923).* This Court takes notice of two cases from immediately adjacent sister states (Washington and Oregon), where their Supreme Courts, *en banc* in each case, held that airborne particles (and grass field burning in particular in the Oregon case) is a trespass. The fact that every single one of the Washington Supreme Court justices unanimously decided the issue in *Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 709 P.2d 782 (1985)*, and every single one of the Oregon Supreme Court justices unanimously decided the issue in *Ream v. Keen, 314 Or. 370, 838 P.2d 1073 (1992)*, is clear guidance to this Court which lacks on point precedent from Idaho's Supreme Court.

Appendix E

The distinction between trespass and nuisance is difficult to understand. The law of nuisance has been described as the most "impenetrable jungle in the entire law." *Brown v. County Commissioners of Scioto County, 87 OhioApp.3d 704, 712, 622 N.E.2d 1153 (1993).* "The courts have been groping for a reconciliation of the doctrines of trespass and nuisance over a long period of time and, to a great extent, have concluded that little of substance remains to any distinction between the two when air pollution is involved." *Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 684, 709 P.2d 782, 786 (1985).* The Washington Supreme Court in *Bradley* clarified the history of this area of the law first, by citing W. Rogers, *Environmental Law*, § 2.13 at 154-57:

> The basic distinction is that trespass can be defined as any intentional invasion of the plaintiff's interest in the exclusive possession of property, whereas a nuisance requires a substantial and unreasonable interference with his use and enjoyment of it. That is to say, in trespass cases defendant's conduct typically results in an encroachment by "something" upon plaintiff's exclusive rights of possession.
>
> The first and most important proposition about trespass and nuisance principles is that they are largely coextensive. Both concepts are often discussed in the same cases without differentiation between the elements of recovery.... It is also true that in the environmental arena both nuisance and trespass cases typically involve intentional conduct by the defendant who knows that his

activities are substantially certain to result in an invasion of plaintiff's interests. The principal difference in theories is that the tort of trespass is complete upon a tangible invasion of plaintiff's property, however slight, whereas a nuisance requires proof that the interference with use and enjoyment is "substantial and unreasonable." This burden of proof advantage in a trespass case is accompanied by a slight remedial advantage as well. Upon proof of a technical trespass plaintiff always is entitled to nominal damages. It is possible also that a plaintiff could get injunctive relief against a technical trespass—for example, the deposit of particles of air pollutant on his property causing no known adverse effects. The protection of the integrity of his possessory interests might justify the injunction even without proof of the substantial injury necessary to establish a nuisance. Of course absent proof of injury, or at least a reasonable suspicion of it, courts are unlikely to invoke their equitable powers to require expensive control efforts.

While the strict liability origins of trespass encourage courts to eschew a balancing test in name, there is authority for denying injunctive relief if defendant has exhausted his technological opportunities for control. If adopted generally, this principle would result substantially in a coalescence of nuisance and trespass law. Acknowledging technological or economic

justifications for trespassory invasions does away with the historically harsh treatment of conduct interfering with another's possessory interests.

Just as there may be proof advantages in a trespass theory, there may be disadvantages also. Potential problems lurk in the ancient requirements that a trespassory invasion be "direct or immediate" and that an "object" or "something tangible" be deposited upon plaintiff's land. Some courts hold that if an intervening force, such as wind or water, carries the pollutants onto the plaintiff's land, then the entry is not "direct." Others define "object" as requiring something larger or more substantial than smoke, dust, gas, or fumes.

Both of these concepts are nonsensical barriers, although the courts are slow to admit it. The requirement that the invasion be "direct" is a holdover from the forms of action, and is repudiated by contemporary science of causation. Atmospheric or hydrologic systems assure that pollutants deposited in one place will end up somewhere else, with no less assurance of causation than the blaster who watches the debris rise from his property and settle on his neighbor's land.

Trespassory consequences today may be no less "direct" even if the mechanism of delivery is viewed as more complex.

Appendix E

> The insistence that a trespass involve an invasion by a "thing" or "object" was repudiated in the well known (but not particularly influential) case of *Martin v. Reynolds Metals Co., [221 Or. 86, 342 P.2d 790 (1959)*], which held that gaseous and particulate fluorides from an aluminum smelter constituted a trespass for purposes of the statute of limitations:
>
> [L]iability on the theory of trespass has been recognized where the harm was produced by the vibration of the soil or by the concussion of the air which, of course, is nothing more than the movement of molecules one against the other.

709 P.2d at 787. Quoting from the *Restatement (Second) of Torts § 821D*, comment d, at 102 (1979) the Washington Supreme Court went on to state:

> For an intentional trespass, there is liability without harm; for a private nuisance, there is no liability without significant harm. In trespass an intentional invasion of the plaintiff's possession is of itself a tort, and liability follows unless the defendant can show a privilege. In private nuisance an intentional interference with the plaintiff's use or enjoyment is not of itself a tort, and unreasonableness of the interference is necessary for liability.

709 P.2d at 789. But then, the Washington Supreme Court adopted the rationale of *Borland v. Sanders Lead Co., 369 So.2d 523, 529 (Ala.1979)*:

Appendix E

Although we view this decision as an application, and not an extension, of our present law of trespass, we feel that a brief restatement and summary of the principles involved in this area would be appropriate. Whether an invasion of a property interest is a trespass or a nuisance does not depend upon whether the intruding agent is "tangible" or "intangible." Instead, an analysis must be made to determine the interest interfered with. If the intrusion interferes with the right to exclusive possession of property, the law of trespass applies. If the intrusion is to the interest in use and enjoyment of property, the law of nuisance applies. As previously observed, however, the remedies of trespass and nuisance are not necessarily mutually exclusive.

* * *

Under the modern theory of trespass, the law presently allows an action to be maintained in trespass for invasions that, at one time, were considered indirect and, hence, only a nuisance. In order to recover in trespass for this type of invasion [i.e., the asphalt piled in such a way as to run onto plaintiff's property, or the pollution emitting from a defendant's smoke stack, such as in the present case], a plaintiff must show 1) an invasion affecting an interest in the exclusive possession of his property; 2) an intentional doing of the act which results in the invasion; 3) reasonable foreseeability that the act done could

> result in an invasion of plaintiff's possessory interest; and 4) substantial damages to the *res*.

709 P.2d at p. 790. In the present case, this Court finds the first three of these elements have been met. The fourth element, "substantial damage to the *res*" goes beyond the damage to the earth under citizens' land. *Mercer v. Rockwell International Corporation, 24 F.Supp.2d 735, (W.D.Ky.1998)* is directly on point. *Mercer* discusses *Bradley*, *Mock* and others, and concludes that "had the imperceptible substance posed *some sort of health hazard*, then there would have been a sufficient injury to support of claim of trespass". The pertinent passage of that case reads:

> One might say that the Court has "labored long and produced a mouse." While that may be true, this lengthy analysis informs the next stage of discussion. The Court must now determine what kind of proof might constitute "actual harm."

C.

> In *Bradley v. American Smelting and Refining* upon certification, the Washington Supreme Court announced the new rule that in cases involving an intentional trespass by imperceptible cadmium and arsenic deposits there must be real and substantial harm to the property. The federal district court was left to decide whether the deposits harmed plaintiff's property. *See Bradley v. American Smelting & Refining Co., 635 F.Supp. 1154, 1157 (W.D.Wash.1986).* The federal court

> eliminated the most obvious injuries to the real property: the deposits were imperceptible to human senses and there was no demonstrable effect on plaintiff's property. The court also rejected plaintiff's argument that the diminished fair market value constituted an injury to his property. According to the district court, any evidence of diminished fair market value can only serve to quantify the magnitude of the injury otherwise proven. *See id. See also, Mock v. Potlatch, 786 F.Supp. 1545, 1551 (D.Idaho 1992).* Thus the court concluded that if there was any injury it "must consist of a hidden hazard." *Bradley, 635 F.Supp. at 1157.* The expert testimony revealed that at these low levels cadmium and arsenic are not harmful and therefore do not constitute an injury to plaintiff's property. Had the imperceptible substance posed some sort of health hazard, then there would have been a sufficient injury to support a claim of trespass. *See id.*
>
> The Court agrees with this approach. Although PCB's are invisible and are not detectable by any other human sense, it is still possible to show that they harm the property.

24 F.Supp.2d at 743. "Plaintiffs may recover if they demonstrate that the amount of PCB's on their property now are a health hazard." *Id. at 745.* In *Karpiak v. Russo, 450 Pa.Super. 471, 676 A.2d 270, 275 (Pa.Super.1996)* the court dismissed a negligent trespass claim because there was no

evidence that the plaintiffs *"suffered ailments from the dust* nor was there evidence that the dust caused any corrosive damage to the property." *Id.* cited with approval in *Mercer, 24 F.Supp.2d at 743*. Aside from the physical injury alleged to the citizens, there certainly is sufficient evidence that the physical effects of the grass field burning cause citizens to not be able to enjoy their property, to the extent that they lock themselves in or move away during the period of burning. That is a significant interference with the *res*. After the Washington Supreme Court ruled on the certified questions in *Bradley v. American Smelting & Refining Co., 104 Wn.2d 677, 684, 709 P.2d 782, 786 (1985)*, the federal district court for the western district of Washington decided what to do with those certified answers. Federal District Judge Rothstein held: "The requirement of damage to the *res* limits 'trespass by airborne pollutants' to cases in which there has occurred an injury that actually interferes with the right to possession." *635 F.Supp. 1154, 1157 (W.D.Wash.1986)*. (bold added). Clearly in the present case, citizens have alleged an interference with their "right to possession". If they have to leave that land due to the pollution, there is a substantial interference with their right to possession.

D. PRESCRIPTIVE EASEMENT.

Farmers argue that even if citizens have a viable trespass claim, farmers have a prescriptive easement over the citizens' land since they have been burning for "many, many years." Meyer et al.'s Memorandum in Support of Defendants' Motion to Dismiss, pp. 22-24. Farmers invite this Court to take judicial notice of the fact that agricultural burning of

bluegrass and other crops have occurred in this region for many, many years. *Id.* p. 22. Certainly this has occurred every year since this judge's birth here in Coeur d'Alene 44 years ago. Farmers also wish this Court to take judicial notice that the trespass of the farmers alleged by the citizens is "open and notorious". *Id.* p. 23. The Court declines to do so. "Open and notorious" are terms with legal significance, and this court cannot take judicial notice of that fact of legal consequence. However, this Court can certainly analyze the issue. Farmers cite *Bradley v. American Smelter & Refining Company, 709 P.2d 782, 792 (Wash.1985)*, in support of their claim for prescriptive easement. This is the only case cited by farmers that deals with air pollution and prescriptive easements. But even a quick look at *Bradley* shows it does not help the farmers claim of prescriptive easement in the present case. In looking at microscopic heavy metals from a smelter in Ruston, Washington, the Washington Supreme Court said:

> There is little likelihood that the doctrine of prescriptive easement will have application to the situation before us. To gain a prescriptive easement, the use must be open, notorious, continuous and uninterrupted for a period of 10 years. We have observed that invasion by particulate matter is not open and notorious and therefore it would indeed be difficult to establish on the part of a defendant that the prescriptive easement period had run. However that may be, there may be instances when a defendant can establish as a defense all of the elements of prescriptive easement, thereby precluding any

> recovery by a landowner. As a practical matter, this would indeed be a blatant and flagrant pollution of adjoining land to start the running of the prescriptive period and to forever bar the landowner from recovering for the continuing activity of the polluter. We recognize the possibility and recognize also that whether or not the invasion of the plaintiffs' land was open and notorious is a question of fact to be established in a forum other than this court.

709 P.2d at 792. (emphasis added). The emphasized portion at the same time indicates 1) why the doctrine of easement by prescription does not apply in the instant cast, and 2) why the farmers wanted to slip this issue by through judicial notice. *Anderson v. Larsen*, 34 P.2d 1085, 1089 (Idaho 2001) certainly does not deal with a field burning fact situation, and to the extent farmers' argue it applies by analogy, would seem to run counter to their claim as it places a strict construction on the "continuous and uninterrupted" use that is required, rather than the "sporadic, periodic and inconsistent in frequency" found by the Court in *Anderson.* The *Anderson* case also makes it crystal clear that the burden of proof placed on the farmers in the instant case is to a clear and convincing standard. *Id.* Farmers simply have not met that standard. *Baxter v. Craney, 135 Idaho 166, 16 P.3d 263 (2000)*, makes it clear that not only must proof by farmers in this case be by clear and convincing evidence, but also:

> The purpose of the requirement that prescriptive use be open and notorious is to give the owner of the servient tenement knowledge and opportunity

> to assert his rights. The open and notorious use must rise to the level reasonably expected to provide notice of the adverse use to a servient landowner maintaining a reasonable degree of supervision over his premises.

16 P.2d at 270. Farmers argument is thus: "we have been burning for many, many years, and that burning put these plaintiffs in this case on notice years ago that if they didn't do something about the burning a long time ago, the farmers would have a prescriptive easement over their land." It is no wonder there is no case law on point. Such an argument finds no support in the law.

Leu v. Littell, 513 N.W.2d 24 (Neb.App.1983) does not involve field burning and does nothing to support farmers' claim of prescriptive easement. *West v. Smith, 95 Idaho 550, 511 P.2d 1326 (1973)* dealt with a houseboat, and is not helpful regarding farmers claims of prescriptive easement.

Although the case addressed "public nuisance" and not trespass, the Washington Court of Appeals specifically held that *no prescriptive right may be acquired to a public nuisance. City of Benton City v. Adrian, 50 Wash.App. 330, 337, 748 P.2d 679, 683 (Ct.App.Wash.1988).*

Farmers have no prescriptive easement across citizens' land.

For the reasons set forth in parts C and D, farmers motions to dismiss on trespass grounds are DENIED in their entirety.

Appendix E

III. CONCLUSION AND ORDER.

Many of the nuisance and trespass cases cited to the Court and cited in the Court's opinion deal with industries or practices which are public or quasi-public in nature and which involve an activity which if not a necessity, is close to being a necessity (sewage treatment plants, irrigation canals, railroads, highways, etc.). In the present case, we are dealing with private individuals (farmers) not performing an essential public service (none of us need grass seed to survive), raising a particular cash crop ... grass seed. An aspect of that crop (burning) is simply not necessary. Depending on which experts the Court believes, there is an economic benefit to the farmer who doesn't burn, or, there is some economic detriment to the farmer who doesn't burn. There is nothing that says any of these farmers *must* plant grass seed. It is a choice they make each year. It is obviously an economically lucrative crop to plant, or they wouldn't plant the grass crop in the first place. However, it is the general public (not a party to this case) and especially those with breathing problems (some of whom are parties to this case), who are damaged each year by the grass field burning. Those parties with breathing problems have historically in essence "paid" a price to "subsidize" those farmers' grass seed crops. The production of grass seed has been in effect "subsidized" for many years because the farmers have historically not paid for the damage caused by the nuisance and trespass caused by the burning of grass seed residue. The motions to dismiss, if granted, would allow that status to remain into the future. The law does not permit citizens' damage to be without a remedy.

Appendix E

Citizens cited *Atlas Chemical Indus., Inc. v. Anderson, 514 S.W.2d 309, 316 (Tex.Ct.App.1974)* for the following:

> No acceptable rule of jurisprudence which permits those engaged in important and desirable enterprises to injure with impunity those who are engaged in enterprises of lesser economic significance. The cost of injuries resulting from pollution must be internalized by industry as a cost of production and borne by consumers and shareholders, or both, and not by the injured individual.

Citizens' Brief in Support of Nuisance and Trespass Claims, pp. 23-24. Using that language of *Atlas* to the facts of the present case, on one side of the scale is placed the farmers, who are engaged in the "important and desirable enterprise" of grass seed growing. A question can be raised as to how "important and desirable" grass seed is to our way of life ... it probably cannot rank as high as sewage treatment, irrigation canals or transportation as a "necessity" to our civilized life. On the other side of the scale found in *Atlas* are persons "engaged in enterprises of lesser economic significance". In the present case, that side of the scale is occupied by persons trying to breathe in the months of August and September each year during grass field burning. This is hardly an "enterprise of lesser economic significance". Instead, it is life itself. As the Court stated at the conclusion of the August 9, 2002 hearing, when you balance simple economics issues on one side of the scale, with health and life issues on the other side of the scale, it is easy to see where the scales of justice will tip.

Appendix E

Citizens causes of action for nuisance and trespass survive the motions to dismiss brought by the farmers. The farmers' motions to dismiss as to citizens' nuisance and trespass causes of action are DENIED in all respects. A decision on injunctive relief will issue as soon as possible.

ENTERED this 19th day of August, 2002.

s/ John T. Mitchell
John T. Mitchell, District Judge

APPENDIX F — ORDER GRANTING PETITION FOR WRIT OF PROHIBITION OF THE SUPREME COURT OF IDAHO DATED SEPTEMBER 12, 2002

SUPREME COURT ORDER

NO. 28889

WAYNE MEYER, et al,

Petitioners,

v.

DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT and HONORABLE JOHN T. MITCHELL, District Judge, First Judicial District, State of Idaho,

Respondents.

ORDER GRANTING PETITION
FOR WRIT OF PROHIBITION

Petitioners filed a VERIFIED PETITION FOR WRIT OF PROHIBITION AND FOR STAY OF PRELIMINARY INJUNCTION, MEMORANDUM IN SUPPORT, AFFIDAVIT OF PETER C. ERBLAND, AFFIDAVIT OF WAYNE R. MEYER, AFFIDAVIT OF PAUL STERNS OF WINDY HILL FARM, INC., and AFFIDAVIT OF KEITH W. DAMAN on September 4, 2002. A VERIFIED MOTION FOR LEAVE TO INTERVENE PURSUANT TO IDAHO APPELLATE RULE 7.1, MEMORANDUM IN OPPOSITION TO PETITION FOR WRIT OF PROHIBITION AND STAY OF PRELIMINARY

Appendix F

INJUNCTION and AFFIDAVIT OF STEVE W. BERMAN were filed September 11, 2002. Based upon the record before the Court, it appears the injunction ordered by the District Court on August 30, 2002 exceeds in some respects the District Court's jurisdiction and should therefore be stayed. Therefore, good cause appearing,

IT IS HEREBY ORDERED that the VERIFIED PETITION FOR WRIT OF PROHIBITION AND FOR STAY OF PRELIMINARY INJUNCTION be, and hereby is, GRANTED.

IT IS FURTHER ORDERED that District Judge John T Mitchell be, and hereby is, prohibited from enforcing the provisions of the Preliminary Injunction issued on August 30, 2002, in Kootenai County Case no. CV 02-3890; Moon v. North Idaho Farmers Assoc.

IT IS FURTHER ORDERED that this order prohibiting enforcement of the preliminary injunction is issued without prejudice to the District Court's or this Court's right to consider these issues after there has been a full presentation of evidence and legal authorities.

IT IS FURTHER ORDERED that the VERIFIED MOTION FOR LEAVE TO INTERVENE PURSUANT TO IDAHO APPELLATE RULE 7.1 be, and hereby is, DENIED as moot.

Appendix F

DATED this 12th day of September, 2002.

By order of the Supreme Court

/s/_____
Linda Copple Trout, Chief Justice



ROAD CLOSURE DURING GRASS BURNING (2002)



GRASS BURN SEPTEMBER 16, 2002



THE BEGINNING OF A GRASS BURN NEAR THE CDA AIRPORT (2002)



PLUMES OF TWO GRASS BURNS COMING TOGETHER ON HWY 41 TO FORM ONE PLUME IN RATHDRUM (2002)